TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 117

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, APPELLANT,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL.

No. 118

UNION PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH WESTERN RAILWAY COMPANY, CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, ET AL., APPELLANTS,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 119

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SECRETARY OF AGRICULTURE, APPELLANTS,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

FILED MAY 31, 1955

JURISDICTION NOTED OCTOBER 27, 1955

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 16, 1955

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[fol. a]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA OMAHA DIVISION

No. Civ-76-53

UNION PACIFIC RAILROAD COMPANY

vs.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION

MEMORANDUM OF PAPERS FILED, AND DATE OF FILING

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[fol. 1] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[File endorsement omitted]

Civil Action No. 76-53

UNION PACIFIC RAILROAD COMPANY; CHICAGO AND NORTH WESTERN RAILWAY COMPANY; CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; GREAT NORTHERN RAILWAY COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; AND WABASH RAILROAD COMPANY, PLAINTIFFS,

VS.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

COMPLAINT—Filed June 25, 1953

Plaintiffs, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific

Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and Wabash Railroad Company, bring this suit to enjoin, annul, suspend and set aside the order issued by the Interstate Commerce Commission (hereinafter called the "Commission") on January 12, 1953, in a proceeding entitled Docket No. 30297, The Denver and Rio Grande Western Railroad Company vs. Union Pacific Railroad Company, et al. The order, copy of which is attached and made a part hereof as Appendix A, requires:

[fol. 2] "*It is ordered*, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

"*It is further ordered*, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn

along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Okahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

"*It is further ordered*, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

"*And it is further ordered*, That this order shall continue in force until the further order of the Commission."

II

Union Pacific Railroad Company (hereinafter called "Union Pacific") as a corporation under the laws of the State of Utah, and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the State of Nebraska and other states hereinafter mentioned.

[fol. 3] Chicago and North Western Railway Company is a corporation under the laws of the State of Wisconsin and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Wisconsin, Illinois, Minnesota, Iowa, South Dakota, Nebraska and other states.

Chicago, St. Paul, Minneapolis & Omaha Railway Company is a corporation under the laws of the State of Wisconsin and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Nebraska, Iowa, Minnesota, and other states.

Northern Pacific Railway Company is a corporation under the laws of the State of Wisconsin and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Minnesota, North Dakota, Montana, Idaho, Washington and other states.

Great Northern Railway Company is a corporation under the laws of the State of Minnesota and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Minnesota, North Dakota, Montana, Idaho, Washington, Oregon, California and other states.

The Atchison, Topeka and Santa Fe Railway Company is a corporation under the laws of the State of Kansas and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Illinois, Missouri, Kansas, New Mexico, Arizona, California, and other states.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company is a corporation under the laws of the State of Wisconsin and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Illinois, Indiana, Wisconsin, Minnesota, North Dakota, South Dakota, Montana, Idaho, Washington and other states.

Wabash Railroad Company is a corporation under the [fol. 4] laws of the State of Ohio and is a common carrier by railroad engaged in the transportation of property and passengers in interstate and intrastate commerce in the States of Michigan, Indiana, Illinois, Missouri and other states.

III

Jurisdiction of this Court over this cause of action is provided by Title 28 U. S Code, Sections 1336, 2284 and 2321-2325, inclusive, which authorizes suits to be brought

in the District Courts of the United States against the United States of America to enjoin, annul, suspend and set aside orders of the Interstate Commerce Commission. Venue of this action is in this Court pursuant to Title 28 U. S. Code, Section 1398, because of the fact that the principal office of the Union Pacific is at 1416 Dodge Street, Omaha, Nebraska.

IV

The proceeding before the Commission in said Docket No. 30297 was initiated by a complaint filed August 1, 1949, by The Denver and Rio Grande Western Railroad Company, as complainant (hereinafter called "Rio Grande") against the Union Pacific and some 200 other railroads, including the plaintiffs herein, alleging, among other things, that the Union Pacific and other railroads, or some of them, failed and refused—

> "* * * to join with complainant in establishing competitive joint rates for the transportation of the freight traffic involved between
>
> "(a) points on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof,
>
> "and
>
> "(b) on freight traffic betwen Utah common points on the one hand, and places on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia, on the other hand,
>
> "which failure and refusal by the defendants constitute violations o Section 1(4), Section 3, Section 15 (1) and Section 15(3) of the Interstate Commerce Act, and is contrary to the National Transportation Policy."

The complaint also alleged that freight rates and charges via the Rio Grande on traffic to and from the territories [fol. 5] described were so much greater than rates and charges via routes of the Union Pacific and other defendants as to prevent the Rio Grande from obtaining a haul "on an unknown volume of competitive traffic" because shippers

will not route their traffic via the Rio Grande at the higher rates and charges.

V

Answers to the complaint were filed by the Union Pacific and numerous other defendant railroads denying the allegations of the complaint. The complaint did not allege that through routes via the Rio Grande are necessary or desirable in the public interest, or that existing routes of the Union Pacific and other railroads are unreasonably long compared to routes via the Rio Grande, or that through routes and joint rates via the Rio Grande to and from the described territories are needed to provide adequate and more efficient or more economic transportation.

[fol. 6]

VI.

Intervenors opposing the complaint and supporting the Union Pacific and other defendants named in the complaint include the State of Nebraska, City of Cheyenne, Wyoming, the Public Service Commissions of the States of Montana, Washington, Oregon, Wyoming, Nebraska and Kansas, chambers of commerce and other associations, certain industrial employe groups in Wyoming, and employe groups of the Union Pacific, the Chicago and North Western Railway Company and the Wabash Railroad Company.

Intervenors in support of the Rio Grande's complaint include the Secretary of Agriculture of the United States, the Public Utilities Commissions of Colorado and Utah, which intervened as their interests might appear, but later fully supported the complaint, the American National Live Stock Association, other live stock and stock feeder associations, various shippers' and producers' associations, milling companies, farm bureaus, chambers of commerce and certain groups of employes of the Rio Grande. The Public Utilities Commission of Idaho intervened without stating its position, but later took the position that the demands of the Rio Grande's complaint should be denied except with respect to live stock and fruits and vegetables.

VII.

Union Pacific owns and operates nearly 10,000 miles of railroad serving more than 1,700 cities, towns and stations

in the States of Iowa, Missouri, Nebraska, Kansas, Colorado, Wyoming, Utah, Nevada, California, Idaho, Montana, Oregon and Washington. Its eastern termini are at Council Bluffs, Iowa, and Kansas City, Missouri, and its western termini are at Los Angeles, California, Portland, Oregon, and Seattle, Washington, and at Ogden, Utah, where it made connection with what is now the Southern Pacific Company on May 10, 1869, to form the first transcontinental railroad in the United States. Beginning in 1878 the Union Pacific constructed and acquired railroad lines north of Ogden in Utah, Idaho, Montana, Oregon and Washington and now owns and operates 5,606.7 miles of railroad in the states just named of which 2,913.19 miles, [fol. 7] or over 50 per cent, consist of numerous branch lines connected with and extending from its main lines in those states.

The standard gauge lines of the Rio Grande, completed in 1890, extend from Ogden through Utah and Colorado to Denver, approximately 600 miles, and to Pueblo and Trinidad, Colorado. The Rio Grande connects with the Union Pacific at Denver, and interchange of traffic between the two railroads can be made at Ogden through the facilities of the Ogden Union Railway & Depot Company, a terminal facility owned and maintained by the Southern Pacific Company and the Union Pacific for the interchange between them of eastbound and westbound transcontinental and other traffic.

VIII.

In the States of Utah north of Ogden, Idaho, Montana, Oregon and Washington (designated by the Commission as the "northwest area" or "excluded territory"), more than 157,000 carloads of freight originate and terminate annually at stations on the main and branch lines of the Union Pacific. Most of the traffic now moves and for many years has moved over the lines of the Union Pacific through Pocatello, Idaho, and Granger, Wyoming, to or from the termini of the Union Pacific at Council Bluffs, Iowa, or Kansas City, Missouri, and the lines of connecting railroads at those two points. A portion of the traffic is moved by the Union Pacific to junctions with other railroads in Oregon, Washington and Montana, and by those

railroads to points on their lines or to connections with still other railroads. By far the greater portion of the traffic moves between the northwest area and the area east of the Missouri River and north of the Ohio River. It is this traffic and the revenue derived from it, or as much thereof as possible, which the Rio Grande seeks through its complaint to the Commission to divert to its line for a "bridge" haul over the entire length of its line between Ogden and Denver for the purpose, as testified by its president, of improving the financial condition and position of the Rio Grande. Routes via the Rio Grande are from [fol. 8] 33 to 219 miles longer than Union Pacific routes and diversion of the traffic to the Rio Grande would short haul or deprive the Union Pacific of its present haul to the extent of about 1,000 miles and would deprive other railroad plaintiffs herein of their entire haul on many thousand carloads of such traffic annually.

[fol. 9]

IX

Union Pacific and other railroads have never established or maintained any through routes and joint rates with the Rio Grande via Ogden on traffic from and to the described territories, except on eastbound sheep or goats and except during a period when the Union Pacific and the Oregon Short Line Railway Company, which is wholly owned by the Union Pacific, were in separate receiverships, at the conclusion of which period, the through routes and joint rates with the Rio Grande were cancelled in 1906 and 1912 with approval of the Commission. No complaints have been filed by shippers or the public or by any state public service commission demanding the through routes and joint rates which the Rio Grande seeks to compel via its line as a result of its complaint to the Commission.

X

Concurrently with the filing of the complaint August 1, 1949, and thereafter, officials of the Rio Grande conducted a vigorous and wide-spread campaign in Colorado, Utah, Idaho, Oregon and other northwestern states in which it solicited, agitated and sought to persuade and procure shippers located upon and served by the Union Pacific and

public service commissions of those states to join with the Rio Grande by intervention and testimony of such nature as to help it win its case. In that campaign, the Rio Grande condemned and vilified the Union Pacific, accused it of violations of law and of the rights of shippers served by it and urged upon shippers that they would benefit by joining with the Rio Grande in supporting its case. Some evidence of that campaign was received by the Commission at hearings hereinafter mentioned, but the Commission excluded and refused to receive most of the evidence offered by the Union Pacific disclosing and portraying the nature, vigor and extent of the Rio Grande's efforts to procure testimony of shippers to help it win its case before the Commission.

After the Examiner's proposed report and recommendations were issued November 20, 1950, U. S. Senator Edwin [fol. 10] C. Johnson of Colorado, then Chairman of the Senate Committee on Interstate and Foreign Commerce which approves or disapproves appointments and reappointments of persons nominated by the President of the United States for positions as Interstate Commerce Commissioners, made radio broadcasts on January 27 and February 2, 1951, over radio station KFEL at Denver, Colorado, in which he praised the Examiner's recommendations as "a great victory for Colorado shippers," denounced the desire of the Union Pacific to retain to its shorter route the traffic originated and terminated on its main line and numerous branch lines in the northwest as "the selfish interests of the Union Pacific" and announced that "I am, and will continue to do all that I can to rid my people of such economic tyranny." Again, on October 28, 1952, immediately following reargument of the case before the Commission on October 15 and 16, 1952, and while the case was under consideration and pending decision by the Commission, Senator Johnson caused or permitted to be published over his signature in the newspaper, Wichita Beacon, Wichita, Kansas, an "editorial" in which he charged Union Pacific with discrimination against shippers located on its own railroad, with maintaining a "transportation monopoly" by refusing to voluntarily deprive itself of revenues from traffic originated and terminated on its own railroad and refusing to join in the Rio Grande's plan to divert the traffic to its line for its financial improvement, asserted that

he had "investigated" the case then pending before the Commission and concluded "that the public interest was on the side of the Rio Grande."

The Commission rejected the Union Pacific's petition to reopen the record and receive copies of the radio broadcasts and "editorial" in evidence.

XI

Hearings upon the complaint were conducted by an Examiner of the Commission at Salt Lake City, Utah, Boise, Idaho, and Cheyenne, Wyoming, after which a proposed report of the Examiner was served upon the parties November 20, 1950, recommending that the Commission grant the [fol. 11] full demands of the Rio Grande's complaint. Exceptions to the proposed report of the Examiner were filed by the Rio Grande with respect to one feature of the proposed report and by the Union Pacific, other railroad defendants, the six state commissions, and other parties supporting the defendants. Oral arguments upon the exceptions were heard by the entire Commission October 11 and 12, 1951, and reargument ordered by the Commission was heard October 15 and 16, 1952.

XII

On January 12, 1953, a majority of the Commission, with certain of the Commissioners dissenting, issued the report and decision attached and made a part hereof as Appendix B hereto in which it announced the following "Conclusions":

> "1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in

carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kan., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the lower peninsula of Michigan and in Oklahoma and Texas.

"2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

"3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act.

"4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained."

Upon the same date the Commission entered its order [fol. 12] mentioned above and attached as Appendix A to this complaint.

XIII

Petitions for reopening, reargument and reconsideration of its decision and order were filed with the Commission by the Union Pacific and several other railroads, by the public service commissions of Nebraska, Wyoming, Idaho, Mon-

tana, Oregon and Washington, and by Union Pacific employees. In those petitions, the Commission was urged to reverse its findings and order and to dismiss the complaint. Petitions for reconsideration were also filed with the Commission by the Rio Grande and a number of shippers and others. On June 22, 1953, the Commission issued and made public its order dated June 10, 1953, denying all the petitions for reconsideration. Copy of that order is attached hereto as Appendix C and made a part hereof.

XIV

Plaintiffs allege that said order of the Commission dated January 12, 1953, is based upon errors of law, is not supported by evidence or adequate findings, exceeds the statutory power of the Commission, and is unlawful, arbitrary, null and void and should be set aside for the following reasons:

1. In rejecting testimony timely offered to prove that the Rio Grande agitated, solicited and procured shippers and others as witnesses to intervene and testify in such manner as to help it win its case and in rejecting transcripts of radio broadcasts over station KFEL at Denver, and an "editorial" by Senator Ed. C. Johnson, published in the Wichita Beacon, the Commission acted arbitrarily, unreasonably and unlawfully.

2. The Commission acted arbitrarily, unreasonably and unlawfully in refusing to accept and consider court decisions and other authorities offered by the Union Pacific in support of the contention that the Rio Grande's solicitation and procurement of shippers to intervene and testify so as to help it win its case, and that the intrusion of and utterances by Senator Johnson vitiated and nullified the proceeding requiring its dismissal by the Commission.

[fol. 13] 3. The Commission acted arbitrarily, erroneously and contrary to law in overruling plaintiffs' motion to dismiss the complaint on the ground that the Rio Grande seeks only to obtain additional revenues to improve its financial position and that the Commission is prohibited by section 15(4) of the Interstate Commerce Act from compelling through routes for that purpose.

4. In holding that, despite the fact that the Rio Grande's

complaint did not and could not raise an issue of undue preference and prejudice among shippers under section 3(1) of the Interstate Commerce Act, such issue nevertheless was tendered for decision because of testimony submitted by shippers, the Commission acted arbitrarily, erroneously and contrary to law.

5. In finding that the combination rates via the Rio Grande are unjust and unreasonable and that joint rates applicable via the Union Pacific and other defendants are reasonable for application via the Rio Grande, the Commission acted arbitrarily, unreasonably and unlawfully in that there was no evidence before it to justify or support such findings.

6. The Commission acted arbitrarily, erroneously and contrary to law in failing to find and hold that the refusal of the Union Pacific and other defendants named in the complaint to equalize shippers in the matter of transit privileges offered by the Rio Grande by joining in lower rates via the Rio Grande does not and cannot violate section 3(1) of the Interstate Commerce Act.

7. The Commission's finding that the combination rates applicable via the Rio Grande on traffic from and to the northwest area or "excluded territory" are unduly prejudicial of shippers and receivers using or desiring to use the Rio Grande's routes and unduly preferential of shippers and receivers using the Union Pacific's routes, is arbitrary, capricious, erroneous and contrary to law in that shippers in said northwest area using or desiring to use the Rio Grande's routes are the same shippers who were found by the Commission to be unduly preferred because they have available and make use of Union Pacific routes at lower joint rates.

8. After correctly finding that there are substantial differences and dissimilarities in transportation conditions [fol. 14] over the Union Pacific compared with those over the Rio Grande, the Commission acted arbitrarily, erroneously, contrary to and without support of evidence in finding that those substantial differences and dissimilarities in transportation conditions "become relatively insignificant" and that "transportation conditions are substantially similar" for the longer hauls and greater distances

between points in the northwest area and points in the southern and eastern part of the United States.

9. The finding that through routes and joint rates via the Rio Grande are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" is contrary to the overwhelming preponderance of the evidence, contrary to and inconsistent with facts clearly found and stated in the Commission's report and is based upon an erroneous interpretation of the words "needed in order to provide adequate, and more efficient or more economic, transportation" used in section 15(4) of the Interstate Commerce Act.

10. The finding that, regardless of the fact that there is no allegation or contention by the Rio Grande that through routes and joint rates via its line for the involved traffic are needed to provide adequate and more efficient or more economic transportation, or that routes of the Union Pacific and other railroads are not adequate, testimony of shippers raises "a question as to the need for more adequate and economic service than afforded by existing routes with respect to some commodities" is arbitrary, erroneous in law and is not supported by evidence.

11. The basic facts found by the Commission are inconsistent with and do not justify or support, but are contrary to its ultimate conclusions and the order based thereon is arbitrary, erroneous and void.

12. The finding that the commodities specified in the order must be moved over as many routes as possible is arbitrary, erroneous and in conflict with and contrary to the provisions of sections 1(4) and 15(4) of the Interstate Commerce Act.

13. The Commission acted arbitrarily, capriciously, erro- [fol. 15] neously, and contrary to the evidence of record in finding that because of the refusal of the Union Pacific and other railroads to join with the Rio Grande in through routes and equal joint rates so that the specified commodities may move over the Rio Grande instead of routes of the Union Pacific and other railroads "the shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation

in the wide-spread system developed for the marketing of such commodities."

14. The finding that for traffic reconsigned or accorded transit privileges at points on the Rio Grande "defendants' routes are inadequate and less economical than are the Rio Grande routes" because higher rates apply via the Rio Grande and "the Union Pacific routes and the joint rates which apply over them are not available" at such points on the Rio Grande, is arbitrary, capricious, erroneous and is based upon a misinterpretation of law.

15. The finding that the situation as to the commodities specified in the order is similar to that in *D. A. Stickell & Sons, Inc.* v. *Alton R. Co.*, 255 I. C. C. 333, is erroneous, contrary to the facts stated in the decision in that case and contrary to the evidence of record in this case.

16. In view of the facts correctly found that there are substantial dissimilar transportation conditions over the Rio Grande compared with those over the Union Pacific, that operating conditions on the Rio Grande are "more onerous" than those on the Union Pacific, that Union Pacific routes are shorter, that the line of the Rio Grande is less favorably situated than that of the Union Pacific and that traffic diverted to the Rio Grande would require at least 24 hours more time in transit and two more terminal yard or interchange services than presently required for movement of traffic over the Union Pacific, the further finding that those substantially different transportation conditions become relatively insignificant when spread over long hauls between the northwest area and the eastern and southern part of the United States, is arbitrary, erroneous, capricious, contrary to law and without any evidence to support or justify it, and is based on an erroneous assumption that [fol. 16] the Commission may lawfully ignore the substantial differences and more onerous transportation conditions of the Rio Grande for longer hauls.

17. The Commission acted arbitrarily, unlawfully and contrary to the evidence in refusing to find and hold that the joint rates via the Union Pacific and other railroads are too low for application via the longer route of the Rio Grande and that such application of the joint rates would

result in wasteful and uneconomic transportation which the Interstate Commerce Act intends to prevent.

18. The findings that the combination rates via the Rio Grande are unreasonable because they are higher than the joint rates applicable via Union Pacific routes and that said joint rates are reasonable for application via the longer routes of the Rio Grande because although depressed and sub-normal the joint rates are the "going rates", and have been in effect for many years, are arbitrary, erroneous, capricious and contrary to law and the evidence of record.

19. The finding that "there is no claim that any of those (joint) rates is below a minimum reasonable level. It follows that the joint rates sought, as presently applied, are within the zone of reasonableness and must be regarded as reasonable rates" is arbitrary, capricious, erroneous in law and contrary to the evidence.

20. The Commission acted arbitrarily and unlawfully in failing and refusing to give effect to the requirement in section 15(4) of the Interstate Commerce Act that reasonable preference be given the originating carrier.

21. The Commission misconstrued and misapplied section 15(4) of the Interstate Commerce Act and exceeded its power in finding and requiring that the shorter Union Pacific routes may be short hauled because routes not more than 37 per cent longer could be made via the Rio Grande and because the Union Pacific would still retain a substantial haul after being short hauled approximately 1,000 miles. [fol. 17] 22. The Commission acted arbitrarily, erroneously and contrary to the evidence in finding that the additional traffic which will be diverted to the Rio Grande under the order can be interchanged through present terminal facilities at Ogden or Salt Lake City without serious detriment to operating efficiency, and in ignoring evidence portraying obstacles of interchange of traffic between the Union Pacific and the Rio Grande at Denver.

23. The Commission acted arbitrarily, capriciously and erroneously in failing to consider the probable injurious effect that any substantial diversion of traffic and revenues from the Union Pacific to the Rio Grande would have upon the Union Pacific, its employes and its service on cities, towns and communities served by it and in failing to find

that the probable diversion of traffic to the Rio Grande would impair and deteriorate service required by shippers and a large segment of the commerce of the country and the national defense.

24. The finding that maintenance by the Union Pacific of joint rates with the Bamberger Railroad at points between Ogden and Salt Lake City, Utah, while refusing to participate in like rates with the Rio Grande discriminates against the latter in violation of section 3(4) of the Interstate Commerce Act is without support of any evidence.

XV

Plaintiffs will be irreparably injured and damaged if the Commission's said order of January 12, 1953, is not restrained, suspended, enjoined, set aside and annulled. Plaintiffs would have no remedy at law to recover such loss or damage.

Said order of January 12, 1953, was originally made to become effective on April 7, 1953, by publishing and filing tariffs with the Commission on not less than 30 days' notice. [fol. 18] Further orders of the Commission dated February 13, April 15, and June 24, 1953, modified the order of January 12, 1953, so that it will become effective on October 7, 1935, by publishing and filing tariffs on September 7, 1953, unless the effective date thereof is further postponed by the Commission, or unless this Court restrains, enjoins, suspends and prevents said order from becoming effective.

If said order becomes effective and plaintiffs have not complied with its requirements, they and each of them will be subject to a penalty of $5,000.00 provided by Title 49, U. S. Code, Section 16(8) for each day they fail to comply with the order.

XVI

Wherefore, Plaintiffs pray:

1. That process may issue against the United States of America and Interstate Commerce Commission;

2. That this Court, by temporary stay, preliminary or interlocutory injunction, stay, restrain and suspend the operation of the order of the Commission dated January 12,

1953, pending the final hearing and determination of this action;

3. That a Court constituted as required by U. S. Code, Title 28, Sections 2284, and 2321-2325, consisting of three Judges, of whom at least one shall be a Circuit Judge, be convened, and that said Court so constituted and convened shall hear this petition upon due and legal notice to defendants;

4. That said Court, upon final hearing of this suit, enter a decree herein permanently suspending, enjoining, setting aside and annulling the said order of the Commission;

5. That Plaintiffs have recovery of the defendants of the proper costs of this suit; and

[fol. 19] 6. That the Plaintiffs have such other and further relief in the premises as to equity may appertain and as may be deemed by this Court fit and proper.

Respectfully submitted, Elmer B. Collins, Attorney for Union Pacific Railroad Company, Plaintiff, 1416 Dodge Street, Omaha 2, Nebraska; F. O. Steadry, Attorney for Chicago and North Western Railway Company, and Chicago, St. Paul, Minneapolis & Omaha Railway Company, Plaintiffs, 400 West Madison Street, Chicago 6, Illinois; Conrad Olson, Attorney for Northern Pacific Railway Company, Plaintiff, 5th & Jackson Streets, St. Paul 1, Minnesota; L. E. Torinus, Jr., Attorney for Great Northern Railway Company, Plaintiff, 175 East 4th Street, St. Paul 1, Minnesota; Roland J. Lehman, Attorney for The Atchison, Topeka and Santa Fe Railway Company, Plaintiff, 80 East Jackson Blvd., Chicago 4, Illinois; Carson L. Taylor, Attorney for Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Plaintiff, 516 West Jackson Blvd., Chicago 6, Illinois; Eugene S. Davis, Attorney for Wabash Railroad Company, Plaintiff, Railway Exchange Building, St. Louis 1, Missouri.

Of Counsel: W. R. Rouse, 1416 Dodge Street, Omaha 2, Nebraska, for Union Pacific Railroad Company; Nye F. [fol. 20] Morehouse, 400 West Madison Street, Chicago 6,

Illinois, for Chicago and Northwestern Railway Company, and Chicago, St. Paul, Minneapolis & Omaha Railway Company; M. L. Countryman, Jr., 5th & Jackson Streets, St. Paul 1, Minnesota, for Northern Pacific Railway Company; Edwin C. Matthias, 175 East 4th Street, St. Paul 1, Minnesota, for Great Northern Railway Company; J. C. Gibson, 80 East Jackson Blvd., Chicago 4, Illinois, for The Atchison, Topeka and Santa Fe Railway Company; M. L. Bluhm, 516 West Jackson Blvd., Chicago 6, Illinois, for Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Joseph H. Miller, Railway Exchange Building, St. Louis 1, Missouri, for Wabash Railroad Company.

[fol. 21] APPENDIX "A" TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 12th Day of January, A. D. 1953

No. 30297

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

v.

UNION PACIFIC RAILROAD COMPANY, et al.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof; and the Commission having found in said report (1) that through routes and joint rates on particular commodities from and to specified areas via Ogden or Salt Lake City, Utah, in connection with the complainant herein, are necessary and desirable in the public interest; (2) that the assailed rates on the same commodities and from and to the same points

are and will be unreasonable and unduly prejudicial and preferential; and (3) that the maintenance by the defendants of joint rates between points in the northwest area, as described in the report, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to unlawful discrimination:

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby notified and required to cease and desist, on or before April 7, 1953, and thereafter to abstain (1) from publishing, demanding, or collecting for the transportation of the commodities and from and to the points named in the next succeeding paragraph hereof, rates which exceed those prescribed in said paragraph, and (2) from practicing the undue prejudice and preference, and the unlawful discrimination, referred to in the next preceding paragraph.

It is further ordered, That said defendants, and the complainant, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, and thereafter to maintain through routes, via Ogden or Salt Lake City, Utah, in connection with the line of the complainant, for the interstate transportation, in carloads, of granite and marble monuments from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as described in the report, and of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the described excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas [fol. 22] to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, Nebr., thence immediately north of points on the lines of the Union Pacific Railroad Company

and the Chicago and North Western Railway Company from Omaha to Chicago, Ill., including destinations in the lower peninsula of Michigan and in Oklahoma and Texas; and to apply on such traffic, over such through routes, joint rates the same as those maintained and applied on like traffic from and to the same points over routes embracing the lines of the Union Pacific Railroad Company through Wyoming.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby notified and required to establish, on or before April 7, 1953, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in Section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference, and the unlawful discrimination, referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

George W. Laird, Acting Secretary. (Seal.)

APPENDIX B to Complaint

20423

INTERSTATE COMMERCE COMMISSION

No. 30297

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY
v. UNION PACIFIC RAILROAD COMPANY ET AL.

Submitted October 16, 1952. Decided January 12, 1953

1. Through routes and joint rates found necessary and desirable in the public interest via Ogden or Salt Lake City, Utah, in connection with complainant, on certain commodities from and to points in the excluded territory in the northwest area as described in the report, to and from points in official, southern, and southwestern territories, including Missouri and a portion of Iowa.
2. Rates on the same commodities from and to the same points over complainant's routes via Ogden or Salt Lake City, found unreasonable and unduly prejudicial to and preferential of shippers and receivers.
3. Maintenance by defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the line of complainant south of Ogden, found to subject complainant to unlawful discrimination.
4. Order entered requiring removal of unlawfulness found to exist and establishment of through routes and joint rates found reasonable.

Robert E. Quirk, *Otis J. Gibson*, and *H. L. Mulliner* for complainant.

Elmer B. Collins, *L. H. Anderson*, *John B. Burchell*, *Robert H. Bierma*, *L. E. Clarahan*, *F. H. Cole, Jr.*, *Eugene S. Davis*, *Lee S. Davis*, *P. H. Draver*, *F. G. Fitzpatrick*, *P. F. Gault*, *R. J. Hagman*, *L. W. Hobbs*, *Roland J. Lehman*, *B. P. Leverich*, *James E. Lyons*, *E. F. McGuire*, *F. J. Melia*, *Conrad Olson*, *W. R. Rouse*, *James S. Souby, Jr.*, *Carson L. Taylor*, and *L. E. Torinus, Jr.*, for defendants.

C. A. Miller for a railroad association; *Chas. B. Bowling*, *Carl R. Bullock*, *Henry A. Cockrum*, and *J. L. Pease* for Secretary of Agriculture; *Ralph C. Horton*, *John H. Winchell*, *Joseph W. Hawley*, *T. S. Wood*, and *Ralph Sargent, Jr.*, for Public Utilities Commission of the State of Colorado; *W. B. Joy*, *H. N. Beamer*, *B. Auger* and *L. F. Purvis* for Public Utilities Commission of Idaho; *Byron M. Gray* for State Corporation Commission of the State of Kansas; *Edwin S. Booth* and *Sidney T. Smith* for Board of Railroad Commissioners of the State of Montana; *Clarence S. Beck*, *Harold A. Palmer*, *Bert L. Overcash*, and *Harry C. King* for State of Nebraska and Nebraska State Railway Commission; *John H. Carkin* and *Thomas W. Dench*

for Public Utilities Commissioner of Oregon; *Smith Troy*, *Phil H. Gallagher*, *Joseph Starin*, and *Bartlett Burns* for Washington Public Service Commission; *Norman B. Gray* and *Jefferson C. Church* for the State Board of Equalization and Public Service Commission of Wyoming; *Hal S. Bennett*, *Donald Hacking*, *W. R. McEntire*, and *Chas. A. Root* for Public Service Commission of Utah; and *George F. Guy* for the city of Cheyenne, Wyo., interveners.

Calvin L. Blaine, *Chas. E. Blaine*, *Maurice H. Greene*, *Alden T. Hill*, *E. K. Kohlwes*, *Lowe P. Siddons*, *Reginald T. Titus*, and *Lee J. Quasey* for other interveners.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Exceptions to the report proposed by the examiner were filed by the complainants, the defendants, and certain interveners and the issues were twice argued orally. Our conclusions differ in part from those recommended. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

The complainant, sometimes called the Rio Grande, a common carrier by railroad operating in interstate commerce within the States of Colorado, Utah, and New Mexico, requests us to order the Union Pacific Railroad Company, which with its leased lines is referred to as the Union Pacific system or the Union Pacific, and the other defendants to establish and maintain for the future just, reasonable, and nondiscriminatory competitive joint through rates[1] and charges for the transportation of freight in connection with the complainant through Salt Lake City or Ogden, Utah, referred to as the Ogden gateway. More particularly, we are asked to require the defendants to establish such joint rates on freight traffic in connection with the complainant through its Colorado and Utah gateways, (1) between (*a*) points on the Union Pacific or its connections in Utah north of Ogden and in Idaho, Montana, Oregon, Washington,[2] and British Columbia, Canada, and (*b*) Colorado common points and points east thereof; and (2) between Utah common points and the northwest territory specified in 1 (*a*).

No evidence was submitted with respect to rates from or to British Columbia, and such rates will not be considered.

Interveners in support of the complaint include the Secretary of Agriculture of the United States, the public utility commissions of the States of Colorado and Utah, the American National Live Stock Asso-

[1] Rates and rate differences named herein are per 100 pounds and are those in effect at the time of the hearing herein.

[2] This area is referred to in this report as the northwest area or territory.

ciation, other livestock and stock-feeder associations, various shippers' and producers' associations, milling companies, farm bureaus, chambers of commerce, and certain groups of employees of the complainant.

Interveners in support of the defendants include the State of Nebraska, city of Cheyenne, Wyo., the public utility commissions of the States of Montana, Washington, Oregon, Wyoming, Nebraska, and Kansas, various chambers of commerce and other associations, certain employee groups in Wyoming, and employee groups of the Union Pacific, the Chicago and North Western Railway Company, and the Wabash Railroad Company.

In its exceptions to the proposed report, the State Corporation Commission of the State of Kansas took the position that the recommended finding that joint rates should be established over the existing through routes by way of Ogden and the Rio Grande is amply sustained by the evidence with respect to the rates on wheat and livestock but not otherwise, and that the recommended findings as to commodities generally are too broad in scope.

The Public Utility Commission of the State of Idaho intervened but presented no evidence. It filed a brief in which it took the position that the relief sought by the complainant should be denied, except that joint through competitive rates should be required to be established via Ogden and the Rio Grande on livestock and fruits and vegetables.

We granted a petition for leave to intervene filed by the American Short Line Railroad Association. That association appeared in support of the complaint and was represented at the hearing and the oral argument, but offered no evidence. The defendants filed a petition for reconsideration of the order permitting intervention. The request was denied at the hearing, but it is renewed on brief. It appears that 44 of the defendants named in the complaint are members of the association and that 8 defendant members are subsidiaries under common control and management with other defendants. Additional facts were developed at the hearing with respect to the relation of certain members of the association as defendants and indicating that they, as well as some others, opposed the complaint. The association filed a brief from which it appears that it has a current membership of 314 common carriers by railroad and that the association as such and many of its members are interested in the issues presented in the complaint. The intervention sought and granted was by the association as such, and not by or in behalf of the respective members thereof named herein as defendants. The petition of intervention was properly granted, and the petition for reconsideration is denied.

Immediately prior to the oral argument, counsel for the defendants submitted a memorandum of additional authorities and discussion

relating to certain exceptions filed by the Union Pacific to the proposed report of the examiner. The complainant and certain interveners objected to the receipt of the document. Our rules of practice do not permit the submission of such a document so late in the proceeding. Permission to file it was not requested in time to permit opposing parties to examine it and to make reply thereto prior to the oral argument when the proceeding was finally submitted. The objection to its receipt in the proceeding is sustained.

The complainant alleges that the defendant's failure and refusal to join with it in establishing joint rates to and from the territories described on transcontinental and other traffic through the gateways referred to result in violations of sections 1 (4) and 3 of the Interstate Commerce Act, and is contrary to the national transportation policy as declared by the Congress. We are asked to prescribe just and reasonable rates over the Rio Grande routes to remove the alleged unlawfulness.

Transcontinental rates apply between points in the Pacific Coast States, Nevada, Arizona, the northern part of Idaho, western New Mexico, and parts of British Columbia, on the one hand, and points in the United States lying generally east of a line along the eastern borders of Montana and Wyoming, thence through Cheyenne and Denver, Pueblo, and Trinidad, Colo., to El Paso, Tex., on the other hand. In the absence of exceptions or restrictions, the rates generally apply over all routes, but there are many exceptions. The principal ones of importance in this proceeding are those under which the Union Pacific for the most part restricts routing on traffic to and from points in Utah north of Ogden and in Idaho, Montana, Oregon, and Washington over its lines so that it may obtain the long haul from and to the Missouri River. On transcontinental traffic that moves over its lines to and from California, Nevada, and portions of Utah, the Union Pacific participates in through routes and joint rates with other lines, including the Rio Grande. On that traffic interchange is made with the Rio Grande at Salt Lake City and Provo, Utah.

As hereinafter explained, the Rio Grande participates in joint rates on transcontinental traffic with all of its connections at its Utah junctions, except the Union Pacific, from and to the western portions of the northwest area. Routes are available to and from points in the northwest area over the Union Pacific from and to Ogden and the Rio Grande and its eastern connections beyond, but generally shippers must pay combination rates when using such routes. The maintenance of those rates produces higher charges than those resulting from the joint rates maintained by the defendants over other routes. The higher rates and charges act as deterrents to shippers and, in effect,

close the Ogden gateway in a commercial sense. We are asked to exercise our authority under section 15 (3) of the act by requiring the establishment of joint rates through that gateway upon findings that such rates are necessary or desirable in the public interest.

The power to establish through routes and joint rates is limited by the provisions of section 15 (4), which declares that, except as provided in section 3 of the act, and except where one of the carriers is a water line, we may not require a railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (*a*) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (*b*) unless we find that the through route proposed is needed in order to provide "adequate, and more efficient or more economic, transportation." The foregoing provisions are subject to the further proviso that in prescribing through routes, we shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (*a*) and (*b*), give reasonable preference to the carrier by railroad which originates the traffic. The section further provides that no through route and joint rates applicable thereto shall be established by us for the purpose of assisting any carrier that would participate therein to meet its financial needs.

The complainant contends that because the routes over which joint rates are sought are in existence and open to traffic at combination rates, we are not called upon to require the establishment of through routes and, therefore, the limitations on our power to do so in section 15 (4) are not applicable and need not be considered. It further contends that the principal task here is to determine whether the through rates resulting from the combination or aggregate of intermediate rates over such through routes are unjust, unreasonable, or discriminatory, in violation of sections 1 and 3 of the act, and contrary to the national transportation policy. The complainant argues that there is public need for joint rates via the Ogden gateway equal to the joint rates now maintained by the defendants over the competitive routes, and that the public interest as well as the national transporation policy will be served by the establishment of such rates.

THROUGH ROUTES

The first question for our determination, therefore, is whether or not the present routes by way of the Ogden gateway constitute "through routes" as that term is used in section 15 (3) and (4) of the

act. As above stated and as testified by numerous shippers in this proceeding, the Ogden gateway routes are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable. Plainly, a finding that such routes should be opened to shippers on a commercial basis by establishing competitive joint rates would result in the establishment of such routes as effective through routes, a character which they do not now possess.

In *Thompson* v. *United States*, 343 U. S. 549, decided June 2, 1952, the Supreme Court considered the question of the content of the term "through route" as used in the act, upon an appeal from a decision of a lower court sustaining our order in *Omaha Grain Exc. of Omaha, Nebr.* v. *Missouri Pac. R. Co.*, 278 I. C. C. 519. Therein, we had affirmed a prior finding of division 2 that a through route on grain from points on the Central branch of the Missouri Pacific Railroad Company in Kansas, Concordia and west thereof (Lenora, Kans., was used as a typical origin), to Omaha, Nebr., and Council Bluffs, Iowa, in connection with the line of the Chicago, Burlington & Quincy Railroad Company beyond Concordia, was already in existence and therefore did not have to be established preliminary to the exercise of our power to prescribe reasonable rates under sections 1 and 15 (1) of the act. The Court held:

> In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.
>
> In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such through route. * * * Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha * * *. Since there is admittedly no evidence that the Missouri Pacific ever offered through transportation service over the route in question, the Commission's order is without evidentiary support under the accepted tests for determining the existence of a through route.

The Court cited with approval *Beaman Elevator Co.* v. *Chicago & N. W. Ry. Co.*, 155 I. C. C. 313, wherein the Commission held that proof of one shipment on a through bill of lading over a particular route was not sufficient to show the existence of a through route, because, as stated by the Court, "that one shipment was not representative of the carriers' course of business." It thus becomes necessary to determine whether the carriers in this proceeding "hold themselves out as offering through transportation service" from and to the points here concerned via the Ogden gateway as indicated by their "course of business" in respect of traffic over the routes in question.

The evidence shows that 37 carload shipments were made in 1948, which may be accepted as a representative year, on through bills of lading from origins in Utah, Idaho, Oregon, and Washington to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific, except three which originated on its connections in Oregon or Washington. Twenty-three moved to Salt Lake City (via Ogden), Provo, Midvale, Murray, and Springville, Utah, and 14 to Denver, Louviers, Pueblo, and Trinidad, Colo., on the complainant's line from Denver to Trinidad. The commodities shipped were canned goods, canned salmon, machinery, contractors' equipment, paper bags, lumber, wallboard, flour, roofing, acid, newsprint, and sheep. The shipments of canned goods and canned salmon, 10 in number, were stopped at intermediate points on the Rio Grande for partial unloading. The 37 shipments moved from or to separate points, except that 2 carloads of canned salmon moved from Seattle, Wash., to Provo, 2 carloads of acid from Dupont, Wash., to Louviers, 2 carloads of canned goods from Logan, Utah, to Denver, 2 carloads of sheep from Bellevue, Idaho, to Pueblo, 3 carloads of lumber from McCall, Idaho, to Salt Lake City, 3 carloads of canned goods from Logan to Pueblo, and 6 carloads of lumber from Emmett, Idaho, to Midvale. No through shipments are shown to have moved from the northwest area over the Union Pacific and the Rio Grande via Ogden or Salt Lake City to any destination east of Colorado common points.

West-bound, in the same year, 18 carload shipments were made on through bills of lading from points in Illinois, Indiana, Michigan, Ohio, Pennsylvania, New Jersey, Arkansas, and Texas over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond to destinations in Utah, Idaho, Montana, Oregon, and Washington. These shipments consisted of tractors, dessert preparations, furniture, canned goods, agricultural implements, soap, cattle, castings, feed, rubber, cottonseed hull bran, and tile. The shipments of tractors, dessert preparations, furniture, canned goods, agricultural implements, and feed were stopped at intermediate points on the Rio Grande or the Union Pacific, or both, for partial unloading. Two of the shipments destined to Idaho points were delivered at Salt Lake City and trucked to destination so as to avoid paying the applicable combination rates on Ogden.

In that same year, 21 carload shipments moving on through bills of lading from various origins east of the Rocky Mountains to destinations in Idaho, Oregon, and Washington, which were routed over the Rio Grande and the Union Pacific, were held by the Rio Grande at Denver or Pueblo for correction of the routing because the joint

through rates were not applicable over that road via the Ogden gateway. Under service orders issued by us during and subsequent to World War II, a substantial number of shipments were diverted from the regularly used routes to the routes here sought to be opened commercially. For example, in February 1949, when the main line of the Union Pacific in Wyoming was blocked by snowstorms, the traffic was diverted to the route of the Rio Grande between Denver and junctions with the Union Pacific in Utah. During World War II, special combination trains of troops in passenger cars and of military supplies in freight cars from eastern and southern origins to destinations in the northwest area were initially routed and moved over the Rio Grande via Ogden and the Union Pacific. The rates and charges for these freight movements were not filed with us and were adjusted, under the authority of section 22 of the act, on the basis of the joint rates applicable over the Union Pacific routes through Wyoming. These movements, as well as those under service orders, were made under emergency conditions and not in the ordinary course of the carriers' business. They show only that the Rio Grande routes were physically practicable, and have no bearing upon the issue of whether or not those routes constitute "through routes" within the meaning of that term as used in the act.

So far as appears, the routes used, or attempted to be used, for the foregoing shipments were those specified by the shippers. There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so by routing specified by the shipper or by a prior connecting carrier. In other words, so far as this record shows, "the carriers' course of business" has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic. That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads east-bound, none to destinations east of Colorado common points, and 18 carloads west-bound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the same points at the joint rates over the Union Pacific routes, the details of which appear later in this report.

Thus, all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the

same category as the shipment held insufficient to show the existence of a through route in *Beaman Elevator Co.* v. *Chicago & N. W. Ry. Co.*, *supra*, cited with approval by the Supreme Court in *Thompson* v. *United States*, *supra*. Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15 (3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15 (4) made in 1940 (see *D. A. Stickell & Sons, Inc.*, v. *Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson* v. *United States*, *supra*.

We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic[a] here concerned, and that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation.

The paramount issue in this proceeding, therefore, is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes, of all traffic in connection with the Rio Grande between the areas involved. For the foregoing reasons, that issue falls within the limitations of section 15 (3) and (4). In addition, evidence was presented bearing upon the issues of the reasonableness of the assailed rates charged on that traffic, discrimination between connecting lines resulting from the refusal of the defendants to join in establishing joint rates lower than the assailed rates, and undue prejudice against shippers using or desiring to use the Ogden-gateway routes. These issues are closely related and will be considered together.

Before proceeding to a discussion of the evidence relating to the foregoing issues, we shall give consideration to a procedural contention and a motion made by the defendants. The contention is that an allegation of undue prejudice and preference under section 3 (1) of the act is not properly before us. As stated, the complaint embodies an allegation, among other things, of violation of section 3, without specifying any particular paragraph or paragraphs of that section. We agree that complainant, a railroad, could not raise, in its own behalf, an issue under section 3 (1) against another railroad. Intervening shippers, however, have raised such an issue. Testimony, pro and con, was received on this issue and we think it has been fairly tendered here for decision.

[a] Except on east-bound shipments of sheep or goats, to which reference is made later in this report.

The motion is that the complaint be dismissed on the ground that the request of the complainant for joint rates over the Rio Grande via the Ogden gateway is for the purpose of assisting that carrier to meet its financial needs. As stated, section 15, (4) of the act forbids us to require the establishment of any through route and joint rate applicable thereto for the purpose of assisting any carrier that would participate therein to meet its financial needs. Consistently throughout the proceeding, the complainant disclaimed any intent to prosecute the complaint with the object of assisting it in meeting its financial needs. The prohibition referred to is directed to us; not to any complaining carrier. In reaching our conclusions herein, no consideration has been given to the financial needs of the complainant. The motion is overruled.

PROPONENTS' TESTIMONY

Joint rates now apply via the Ogden gateway over the Rio Grande on traffic from and to Colorado common points and points east thereof to and from California and certain Pacific coast points in connection with the Union Pacific, the Southern Pacific Company, The Western Pacific Railroad Company, and The Great Northern Railway Company, as more particularly described later.

The Union Pacific with its leased lines has operated since January 1936 as a single system. It consists of the Union Pacific Railroad Company operating from Omaha, Nebr., and Kansas City, Mo., to Ogden via Julesburg, Colo., Cheyenne and Granger, Wyo., and via Limon and Denver, Colo., and Cheyenne; the Oregon Short Line Railroad Company operating in Utah north of Ogden, and in Wyoming, Idaho, Oregon, Montana, and Nevada, extending from Salt Lake City to Butte, Mont., and Huntington, Oreg.; the Oregon-Washington Railroad and Navigation Company operating in Idaho, Oregon, and Washington north and west of Huntington to Spokane, Wash., Portland, Oreg., and Seattle, Wash.; the Los Angeles & Salt Lake Railroad Company from Salt Lake City to Los Angeles, Calif.; and the St. Joseph & Grand Island Railroad Company in Kansas, Nebraska, and Missouri from St. Joseph, Mo., and Grand Island, Nebr. Lease of the properties of the foregoing roads, which had been operated with the Union Pacific under common control and management, was considered and approved in *Union Pac. R. Co. Unification*, 189 I. C. C. 357 (1933) and 207 I. C. C. 543 (1935).

The railroad now operated by the complainant was originally the Denver, Rio Grande Railway organized in 1870 as a narrow-gage line. After passing through various hands and receiverships, the Denver and Rio Grande Railroad Company was organized in 1886 to operate the property. When the main line was converted to standard gage

in 1890, the railroad was opened for through traffic between Denver and Ogden by way of Pueblo, Rio Grande, and Tennessee Pass, Colo. Prior to that date, the Rio Grande could participate in transcontinental traffic only by transferring the lading to its narrow-gage cars. In 1901, it acquired the Rio Grande Western Railroad Company operating between Grand Junction, Colo., and Ogden via Provo and Salt Lake City.

Although opened for through business, the line was handicapped by the fact, among others, that traffic originated at or destined to its Colorado gateways or east thereof could not be interchanged at joint through rates at Ogden or Salt Lake City with its connections, the Oregon Short Line, to or from points on that line in Utah north of Ogden and through southern Idaho to Butte and Huntington. Also, traffic from and to Oregon over the Southern Pacific, to or from Colorado common points and east, could not be transported over the Rio Grande at joint rates equal to those over competitive routes. In 1897, however, the Union Pacific and its controlled lines, the Oregon Short Line and the Oregon-Washington Railroad and Navigation Company operating north and west of Huntington, were in separate receiverships. In that year the two lines last named established joint through rates to and from points in the northwest area with the Rio Grande via Ogden and thus opened that gateway at rates equal to the rates then in effect over the Wyoming line of the Union Pacific through Cheyenne and Granger. Those rates applied on traffic between the Pacific coast terminals, including Portland, Tacoma, and Seattle, and Missouri and Mississippi River points and numerous points east thereof.

In the same year, the Oregon-Washington Railroad and Navigation Company established joint through rates between its Oregon and Washington stations and points on, or reached by, the lines of the Great Northern and Northern Pacific Railway Company through Spokane and Wallula, Wash. Joint rates through those junctions from and to Union Pacific stations have been continued in effect.

Ogden remained as an open gateway through which joint rates over the Rio Grande applied until 1906, when such rates were canceled by the Union Pacific from and to Colorado common points and east, to and from points in Montana, Idaho, and Oregon on the Oregon Short Line and its connections. In 1912, transcontinental freight rates to and from points on the Oregon-Washington Railroad and Navigation Company (resulting from reorganizations in the interval) over the Rio Grande and its Utah junctions were also canceled. During this period the Southern Pacific was controlled by the Union Pacific and that circumstance greatly influenced the routing of freight and passenger traffic over the Union Pacific to and from

Oregon and California. As a result of competitive stresses, as well as for other reasons, the Rio Grande financed the construction of a new railroad, the Western Pacific, to obtain an outlet to the Pacific coast. The Western Pacific was opened in July 1911 and participates in through routes and joint rates on transcontinental traffic via Salt Lake City with the Rio Grande and the Union Pacific, its two connections at that point. In 1912, the Union P cific was required to divest itself of control of the Southern Pacific. *United States* v. *Union Pac. R. Co.*, 226 U. S. 61.

Through passenger fares also were in effect over the lines of the Union Pacific and the Rio Grande via the latter's Colorado and Utah junctions from 1897 to 1915, when they were canceled by the Union Pacific. *Ogden Gateway Case*, 35 I. C. C. 131.

In 1915, the Western Pacific and, in 1918, the Rio Grande, went into receivership. After various changes, the latter was reorganized on April 11, 1947, as The Denver and Rio Grande Western Railroad Company. *Denver & R. G. W. R. Co. Reorganization*, 267 I. C. C. 862. As a part of its reorganization on that date, the Rio Grande merged with the Denver and Salt Lake Railway Company, and thereby acquired the Moffat tunnel line of that carrier. By that line and the Dotsero cut-off, completed in 1934, from Orestod, Colo., on the Denver & Salt Lake to Dotsero, Colo., on its own line, the Rio Grande obtained a route from Denver to Ogden 175 miles shorter than its route through Pueblo.

The Rio Grande now operates between Denver and Ogden over the two routes. By way of the Moffat tunnel the distance is 607 miles, and the other route through Pueblo is 782 miles. These two are the main lines and constitute 951 miles, or 51 percent, of the Rio Grande standard-gage tracks. In addition, there are 1,452 miles of branch lines, of which 527 miles are narrow gage serving western Colorado and northwestern New Mexico in areas of small population and light traffic. In all, it operates about 2,400 miles of road.

Eastern connections of the Rio Grande are in Colorado at Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad. At Denver, it connects and interchanges traffic with the Union Pacific, the Chicago, Burlington & Quincy Railroad Company, called the Burlington, the Chicago, Rock Island and Pacific Railroad Company, called the Rock Island, The Atchison, Topeka and Santa Fe Railway Company, called the Santa Fe, and The Colorado and Southern Railway Company, of the Burlington system. At Colorado Springs, 75 miles south of Denver, it interchanges with the Rock Island and the Santa Fe. At Pueblo, 119 miles south of Denver, it interchanges with the Missouri Pacific Railroad Company (Guy A. Thompson, trustee), the Santa Fe, and the Colorado & Southern. At Walsenburg, 51

miles farther south, it interchanges with the Colorado & Southern. At Trinidad, a short distance from the Colorado-New Mexico State line and 92 miles south of Pueblo, it interchanges with the Colorado & Southern and the Santa Fe.

Western connections of the Rio Grande are in Utah at Ogden, Salt Lake City, and Provo. At Ogden, the connecting lines are the Union Pacific and the Southern Pacific. At Salt Lake City, 37 miles south of Ogden, the connections are the Western Pacific and the Los Angeles line of the Union Pacific. At Provo, 44 miles south of Salt Lake City, it again connects with the Union Pacific's Los Angeles line.

Since 1890, when its standard-gage line was completed between Denver and Ogden via Pueblo, the Rio Grande, through its eastern and western connections, has been a part of several transcontinental routes. It now participates in through routes and joint rates on equal terms with other carriers on transcontinental traffic between (1) points in an area generally described as west of a line beginning at Vancouver, British Columbia, thence south, just east of Seattle and Portland, and southeasterly to a point west of Ogden and Salt Lake City, crossing the line of the Union Pacific at Lynndyl, Utah, 118 miles west of Salt Lake City, and thence southwesterly, east of the Union Pacific's Los Angeles line, to a point south of San Diego, Calif., and (2) all points in the United States east of a line beginning at the Canadian border and extending southward along the Montana-North Dakota State line and the western border of South Dakota, thence southwesterly through the extreme southeastern portion of Wyoming, west of Cheyenne, and the eastern part of Colorado just west of Denver, Pueblo, and Trinidad, thence southwest and south through the central or western part of New Mexico to a point just west of El Paso. However, joint rates generally do not apply in connection with the Rio Grande on transcontinental traffic originating at or destined to points in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington east of the line first described. Joint rates apply on such traffic over the Union Pacific through Wyoming, but if routed over the Rio Grande such traffic would move at higher combinations of rates to and from Ogden or Salt Lake City.

The area in Utah north of Ogden, and in Idaho, Montana, Oregon, and Washington, to and from which joint rates generally do not apply in connection with the Union Pacific and the Rio Grande, will be referred to as the excluded territory. Transcontinental traffic to or from such territory ordinarily moves over the Union Pacific from or to Colorado or Missouri River gateways, rather than over the Rio Grande route, because the Union Pacific routes are shorter and, as stated, joint rates are not available over the Rio Grande route. The Rio Grande desires to participate as a bridge line on such traffic via

its Colorado gateways and Ogden at the joint through rates. This also would include traffic to or from points in the excluded territory on lines which join with the Union Pacific in joint rates.

Representative origins, destinations, commodities, rates, distances, average loadings per car, and revenues per car-mile are shown in an appendix to this report, for east-bound and west-bound movements, compiled from exhibits of record. The distances shown are those over existing routes over the Union Pacific and its connections by which joint through rates apply, and over the Rio Grande and its connections over which combination rates apply. Revenues per car-mile are computed for such rates and distances and, in addition, for the distances over the Rio Grande at joint rates on the same basis as those over the Union Pacific routes, as sought herein.

Traffic between the excluded territory and Colorado common-point territory (points in eastern Colorado from Denver south to Trinidad and west to Canon City) generally must move over the Union Pacific through Denver to get the lowest rate. Similarly, traffic between the excluded territory and Utah common-point territory (points in Utah from Ogden south to Provo and Payson) generally must move over the Union Pacific to get the lowest rate. There are some exceptions, however, with respect to rates between Utah common points on the Rio Grande and the northwest area on livestock, lumber, grain, and other commodities.

An analysis of distances from and to 5 representative points[4] on the Union Pacific in Utah north of Ogden, and in Idaho and Washington, to 14 destinations, Denver and east, over restricted routes of the Union Pacific for distances, computed over the short routes, ranging from 649 miles to Denver to 3,279 to Boston, Mass., shows that routes via Ogden and the Rio Grande to the same points are longer by from 1 percent (from Spokane to New Orleans, La.) to 16 percent (from Idaho Falls to Kansas City). To the same destinations from nine other representative points[5] on the Union Pacific, from which through routes and joint rates are available in connection with the Chicago, Milwaukee, St. Paul, and Pacific Railroad Company, referred to as the Milwaukee, the Great Northern, the Northern Pacific, or the Southern Pacific, the routes via Ogden and the Rio Grande would be longer than the short workable and service routes by from 1 percent (from Seattle to Fort Worth, Tex., and Oklahoma City, Okla.) to 37.5 percent (from Yakima to Minneapolis, Minn.). To Minneapolis from seven of the nine origin points, the routes via the Great Northern form the short workable and service routes.

[4] Logan, Utah; Boise, Idaho Falls, and Twin Falls, Idaho; and Spokane, Wash.

[5] Hood River, Milton, Pendleton, Portland, Elgin, and Redmond, Oreg., and Yakima, Kent, and Seattle, Wash.

The Ogden-gateway routes of the Union Pacific consist of two lines. The Los Angeles line runs southwesterly through Salt Lake City, Provo, and Delta, Utah, Caliente and Las Vegas, Nev., and Barstow, Calif., to Los Angeles. Through routes with joint rates are maintained over that route in connection with the Rio Grande, as hereinbefore described. The other line of the Union Pacific runs north from Ogden, 111 miles to McCammon in southeastern Idaho. At that point it meets the Wyoming line of the Union Pacific leading west 486 miles from Granger, the junction point with the main line through Cheyenne to Ogden from the east. From McCammon the line extends north to Pocatello, Idaho, 22 miles, and from that point the main line runs in a northwesterly direction across Idaho into Oregon and Washington. From Pocatello another line extends northerly to Butte. From Cheyenne, the main line extends east across Nebraska to Omaha, 507 miles, and south to Denver, 109 miles. From Ogden through Granger to Cheyenne the distance is 488 miles.

All shipments to or from points in Idaho, Montana, Oregon, and Washington north or west of McCammon over present Union Pacific routes, or over routes through Ogden and the Rio Grande, must pass through McCammon. That point therefore, is used as the point of divergence in computing distances over the Union Pacific routes and the routes over the Rio Grande by way of Ogden. A shipment from McCammon over the Union Pacific to Cheyenne would move 529 miles; and to the Denver gateway, also over the Union Pacific, 623 miles. But over the Union Pacific to Ogden, thence the Rio Grande to the Denver gateway, the shipment would move 718 miles, or 198 miles farther than over the Union Pacific route to Cheyenne and 95 miles farther than over its route to Denver. On shipments carried through to the Missouri River and points east, the Union Pacific route through Cheyenne also has the advantage in distance.

From Cheyenne to Kansas City a shipment would move 624 miles, as compared with 636 miles for a movement off the Rio Grande from Denver to Kansas City over the Rock Island, its short-line connection. A through shipment, therefore, from McCammon to Kansas City over the direct line of the Union Pacific through Granger and Cheyenne would move 1,153 miles, as compared with 1,352 miles, 199 miles longer, via Ogden and the Rio Grande to Denver, thence the Rock Island. The latter route on such a shipment would be 17.2 percent circuitous. To points east of Kansas City the maximum excess mileage from McCammon over the Rio Grande route is on a haul to Pittsburgh, Pa. Over the Union Pacific to Omaha, thence the Chicago & North Western to Chicago, Ill., and The Pennsylvania Railroad Company beyond, the haul would be 1,991 miles, and over the Union Pacific to Ogden, the Rio Grande to Denver, the Burlington to Chi-

cago, thence the Pennsylvania, the haul would be 2,203 miles, 212 miles longer, or a circuity of 10.7 percent.

In the following table are shown representative destinations and the distances from McCammon over routes using the Rio Grande from Ogden to Denver, as compared with distances over routes using the Union Pacific through Wyoming. Joint through rates apply over the latter routes. Over routes that include the Rio Grande higher combination rates apply. The table does not contain complete routing, except over the Union Pacific direct to Omaha and Kansas City. The last column of the table shows the percentages by which the Rio Grande routes are longer, or the circuity, from the point of divergence, McCammon, to the points shown.

From McCammon, Idaho to—	Via Union Pacific	Distance	Via Rio Grande	Distance	Difference	Circuity via Rio Grande
		Miles		*Miles*	*Miles*	*Percent*
Omaha, Nebr	(1)	1,036	(2)	1,255	219	21.1
Kansas City, Mo	(3)	1,153	(2)	1,352	199	17.2
Minneapolis, Minn	(3)	1,396	(2)	1,593	197	14.1
St. Louis, Mo	(3)	1,428	(2)	1,627	199	13.9
Chicago, Ill	(1)	1,524	(2)	1,735	211	13.8
Pittsburgh, Pa	(1)	1,991	(2)	2,203	212	10.7
Charleston, W. Va	(3)	2,018	(2)	2,218	200	10.0
Columbia, S. C	(3)	2,274	(2)	2,473	199	8.8
Baltimore, Md	(1)	2,319	(2)	2,521	202	8.7
Norfolk, Va	(3)	2,438	(2)	2,637	199	8.2
New York, N. Y	(1)	2,477	(2)	2,674	197	8.0
Tulsa, Okla	(4)	1,377	(5)	1,427	50	3.6
Dallas, Tex	(6)	1,456	(5)	1,489	33	2.3
Fort Smith, Ark	(4)	1,458	(5)	1,538	80	5.5
Memphis, Tenn	(3)	1,593	(5)	1,786	193	12.1
New Orleans, La	(3)	1,970	(5)	2,003	33	1.7
Atlanta, Ga	(3)	2,044	(5)	2,204	160	7.8
Savannah, Ga	(3)	2,327	(5)	2,486	159	6.8

[1] Union Pacific through Wyoming to Omaha.
[2] Union Pacific to Ogden, Rio Grande to Denver.
[3] Union Pacific through Wyoming to Kansas City.
[4] Union Pacific to Pacific Junction, Kans.
[5] Union Pacific to Ogden, Rio Grande to Pueblo.
[6] Union Pacific to Denver, Colorado & Southern to Sixala, N. Mex.

The differences in the distances to destinations in the Southwest over routes including the Rio Grande from points in the excluded territory, as compared with the Union Pacific routes through Wyoming, are much less than they are to Missouri River crossings and points east and southeast. About 90 percent of the traffic upon which joint through rates are sought via Ogden and the Rio Grande moves to the latter areas, and about 10 percent to the Southwest.

Over its routes through Wyoming, the Union Pacific gets its long haul from McCammon to Omaha, 1,036 miles, and to Kansas City, 1,153 miles. If joint rates were prescribed over the Union Pacific to Ogden and the Rio Grande to Denver, the Union Pacific's haul from McCammon to Ogden on traffic to Omaha or Kansas City and beyond would be 111 miles. However, if such traffic were routed beyond Denver over the Union Pacific, the latter would get a further

haul of 560 miles to Omaha via Julesburg, or 640 miles to Kansas City via Salina, Kans., a total haul from McCammon of 671 miles to Omaha or 751 miles to Kansas City. Joint through rates are in effect over that route on sheep from Union Pacific origins in southern Idaho and eastern Oregon, but are 19 cents higher to the Missouri River and east (20 cents to Chicago) than rates over more direct routes of the Union Pacific. That railroad would establish a similar basis on cattle if requested. Over the route in connection with the Rio Grande, it would lose its haul of 529 miles from McCammon to Cheyenne, or 623 miles to Denver. On traffic routed via Ogden, the Rio Grande, and Pueblo to destinations east thereof, the Union Pacific would not be in a position to get any additional haul.

All of the foregoing distances, as stated, are computed from McCammon as the point of divergence. The great bulk of the traffic, however, from the excluded territory in Idaho, Montana, Oregon, and Washington originates or terminates on the Union Pacific or its connections west and north of that junction. On such traffic the Union Pacific would have a substantial haul in addition to that of 111 miles from McCammon to Ogden.

The hauls to Ogden would be, for example, from Lewiston, Idaho, 847 miles; from Centralia, Wash., 937 miles; and from Seattle, 1,029 miles. Over the Union Pacific direct from those respective origins to Omaha, the hauls would be 1,772, 1,862, and 1,954 miles. Those figures show the extent to which the Union Pacific would lose its long haul, the loss in mileage being 925 miles in each instance.

From and to points in the excluded territory in Oregon and Washington, and on the Burke and Headquarters branches of the Union Pacific in northern Idaho, the Union Pacific and certain other defendants have arrangements for the interchange of traffic in various commodities at junctions or gateways in Oregon, Washington, and Idaho, under joint rates. On traffic through such gateways moving under the joint rates, the Union Pacific in many instances foregoes its long haul. The gateways through which the rates are in effect, with certain limitations upon their application specified in the tariffs, are: Portland, in connection with the Southern Pacific; Marengo, Wash., and Plummer, Idaho, in connection with the Milwaukee; Spokane, in connection with the Great Northern; Wallula, Wash., and Spokane, in connection with the Northern Pacific; and Spokane, in connection with the Spokane International Railroad Company connecting with the Canadian Pacific Railway Company at Eastport, Idaho, at the Canadian border.

Illustrative of the hauls over the Union Pacific on traffic routed through these gateways are the following: From Lewiston, 132 miles via Marengo or 193 miles via Spokane; from Centralia, 393 miles

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on a route through Marengo; from Seattle, 184 miles through Portland; and from Pendleton, Oreg., 165 miles via Marengo, 227 miles via Spokane, or 70 miles via Wallula, Wash., on traffic routed over its connections at such points. If joint rates were established from the same origin points to Omaha and beyond via Ogden and the Rio Grande, the hauls of the Union Pacific to Ogden would be substantially greater than many of its hauls via other junctions with its connections, as illustrated.

For example, from Pendleton, a representative point, on traffic to Chicago the Union Pacific has a haul of 1,560 miles on its route through Omaha, but only 70 miles over an established through route via Wallula and the Northern Pacific and connections. The rates are the same over both routes. Over a route via Ogden and the Rio Grande to Denver, thence the Burlington, the distance is 2,257 miles, or 6.4 percent longer than the route via Wallula and 10.4 percent longer than the Union Pacific route through Omaha. The Union Pacific's haul over the Rio Grande route would be 633 miles. From Pendleton to St. Louis, the Rio Grande route sought would be shorter by 168 miles than a through route now available via Spokane and the Spokane International and its connections, and would be 201 miles, or 10.3 percent, longer than the Union Pacific route through Kansas City. To Oklahoma City, Okla., the haul of the Union Pacific would be increased from 227 miles, over the present route via Wallula and the Northern Pacific and connections, to 633 miles via Ogden and the Rio Grande to Pueblo and the Santa Fe beyond. The distance over the latter route is 1,910 miles, or only 34 miles, 1.3 percent, longer than the route which gives the Union Pacific its long haul, and 692 miles, or 36.2 percent, shorter than the foregoing route through Wallula.

The foregoing are illustrative of numerous established through routes in which the Union Pacific participates from points in the excluded territory which short haul that carrier. Many of such routes are longer than those here sought via Ogden and the Rio Grande, and this is true to all sections of the country east of the Rocky Mountains, except western trunk-line territory. To the latter territory the short-hauling routes are generally shorter than the routes by which the Union Pacific retains its long haul, and considerably shorter, for example, by 37.5 percent from Yakima to Minneapolis, than the routes sought via Ogden and the Rio Grande. As indicated, the portion of the excluded territory from and to which this short hauling of the Union Pacific occurs does not include points in Utah nor points in Idaho, except on the Burke and Headquarters branches of the Union Pacific in the northern portion of that State.

These short-hauling routes have been in effect for many years. Most of them were established prior to the dates when the Union

Pacific assumed control of the portions of its line west of Huntington and south of Salt Lake City. Joint rates with the Southern Pacific through Portland have been in effect since about 1910, with the Milwaukee through Marengo and Plummer since about 1902, with the Great Northern through Spokane since about 1894, with the Northern Pacific through Wallula since about 1883, and with the Spokane International through Spokane since about 1907.

On some of the traffic interchanged at these gateways the Union Pacific obtains a short haul, as compared with its connections, and on other traffic a long haul. East-bound traffic through the specified Washington and Idaho gateways consists of apples, pears, lumber and other forest products, some steel products, and miscellaneous commodities. A large portion of the traffic, particularly lumber, moves to North and South Dakota, Minnesota, and Wisconsin over the northern routes. Traffic over such routes moves also to Midwestern States and to States east of the Mississippi River. West-bound traffic through the same gateways consists of manufactured products and miscellaneous commodities from the Middle West and from eastern and southern territories.

These interchange arrangements are warranted and in the public interest, according to the defendants, because each carrier shares in long hauls on some traffic as well as short hauls on other traffic, and because the arrangements make it possible for the carriers to handle traffic over shorter routes in many instances. This latter statement, however, applies only, except to an insignificant extent, to such routes to and from points in western trunk-line territory.

As indicated, through routes and joint rates apply in connection with the Rio Grande through Provo on traffic to or from points on the Los Angeles line of the Union Pacific. Such routes generally are shorter than routes over the Union Pacific direct to or from Omaha, Kansas City, or Denver. The following is illustrative:

From Los Angeles, Calif., to—	Via Union Pacific	Distance	Via Rio Grande	Distance
		Miles		*Miles*
Omaha, Nebr.	(1)	1,808	(2)	1,813
Minneapolis, Minn.	(1)	2,168	(2)	2,152
Kansas City, Mo.	(3)	1,925	(3)	1,911
St. Louis, Mo.	(3)	2,200	(3)	2,185
Denver, Colo.	(4)	1,395	(2)	1,276
Chicago, Ill.	(1)	2,296	(2)	2,293
Atlanta, Ga.	(3)	2,816	(5)	2,762
Little Rock, Ark.	(3)	2,430	(3)	2,272
Dallas, Tex.	(5)	2,226	(5)	2,045

[1] Union Pacific to Omaha.
[2] Union Pacific to Provo and Rio Grande to Denver.
[3] Union Pacific to Kansas City.
[4] Union Pacific to Denver.
[5] Union Pacific to Provo and Rio Grande to Pueblo.

Other defendants also participate in through routes with joint rates on traffic moving to or from points on the Union Pacific in the excluded territory from and to eastern points and voluntarily forego their long hauls. For example, the Burlington, the Rock Island, the Santa Fe, and the Missouri Pacific participate in joint rates with the Union Pacific through Kansas City and Omaha. The railroads named could haul the traffic for longer distances over their own rails to Pueblo, Denver, or Cheyenne, instead of permitting shippers to route through Kansas City and Omaha in connection with the Union Pacific.

The total amount of traffic moving between the four Northwestern States and points east of the Colorado common points is substantial. According to figures computed by the Union Pacific, transcontinental carload traffic from the East in the year 1948 over the Union Pacific through Wyoming to those Northwestern States totaled 55,631 cars. of these, (1) 81.7 percent originated in eastern Colorado, Kansas, Missouri, Kentucky, Virginia and all States north thereof, (2) 10.8 percent in Texas, Oklahoma, Arkansas, and Louisiana, and (3) 7.5 percent in Tennessee, Mississippi, Alabama, Georgia, Florida, North Carolina, and South Carolina. About 62 percent of the total consisted of manufactures and miscellaneous traffic, most of which originated in group (1). East-bound traffic from the four States to the same three groups in the same year totaled 116,278 carloads, of which 84.1 percent went to group (1), 10.5 percent to group (2), and 5.4 percent to group (3). About 75 percent of that total consisted of agricultural and forest products.

Of the total carloads, 171,909 in both directions, 121,909 originated or terminated in the excluded territory and the remainder, 50,000, originated or terminated at points in Oregon and Washington west of that territory. The Rio Grande is in a position to solicit movements of the latter traffic over its line at competitive joint through rates in connection with longer routes over the Southern Pacific from Portland to Odgen or over the Great Northern to Bieber, Calif., and the Western Pacific to Salt Lake City. These joint rates are the same as the rates which apply over the direct routes of the Union Pacific from origins on that road in the same area west of the excluded territory. For example, from Seattle to Denver the distance is 1,538 miles over the Union Pacific direct and 1,894 miles over the Union Pacific to Portland, the Southern Pacific to Odgen, and the Rio Grande beyond. In addition to the joint rates sought via the Ogden gateway from the excluded territory, the complainant is also seeking joint rates from the northwest area west of the excluded territory, the same as those in effect over the Union Pacific, Southern Pacific, and Great Northern-Western Pacific routes, for application in connection with the Union Pacific via the Ogden gateway.

A substantial volume of traffic is handled by the Rio Grande in connection with the described routes over which it participates in competitive joint through rates to and from Oregon, Washington, and British Columbia. For example, in 1948 the Rio Grande handled 30,486 carloads in connection with the Southern Pacific and 7,152 carloads in connection with the Western Pacific-Great Northern. In 1947, the volume was 22,722 and 8,909 carloads over the respective routes. Most of this consisted of lumber from Southern Pacific origins south of Portland.[6]

The complainant's estimate of the traffic in carloads that would be potentially available to and from the excluded territory for solicitation by the Rio Grande, in the event competitive joint rates were established over its line via Ogden, from Idaho, Montana, Oregon, and Washington is about 29 percent greater than the volume of traffic, according to the Union Pacific, that moved in 1948 over its Wyoming lines. The estimate was based upon the total carload traffic originated and terminated by the Union Pacific in the years 1944 to 1948, inclusive. It included commodities within the description of products of agriculture, animals and animal products, products of mines, products of forests, and manufactures and miscellaneous commodities. The total carloads estimated as originated by the Union Pacific annually in the area specified was 101,476 and the number terminated 56,286, a total "potential" of 157,762 carloads.

This estimate did not include any shipments that might originate or terminate off the line of the Union Pacific and mover over that carrier as part of a longer haul. Although stated to be a conservative estimate of potential traffic, it was computed from a substantial number of reliable sources, and represents the complainant's best analysis of the traffic considered available for solicitation. No attempt was made to estimate the amount of traffic that the Rio Grande might actually obtain from these potential sources other than a statement that there was no probability that it would get more than 10 percent and that the amount probably would be less than 10 percent because of the vigorous competition of the Union Pacific. This figure of 10 percent as a maximum was derived from the experience of the Rio Grande in obtaining other transcontinental traffic now moving at joint rates in competition with the Santa Fe, Southern Pacific, Union Pacific, Great Northern, Northern Pacific, and Milwaukee. If the Ogden gateway were opened to traffic to and from the four States named, there would be active

[6] Prior to February 1, 1949, joint rates applied over the Bieber route in connection with the Rio Grande to competitive territory in Colorado and east thereof on lumber from certain origins in Oregon and Washington on the Oregon Trunk Railway and the Spokane, Portland and Seattle Railway Company (subsidiaries of the Great Northern and Northern Pacific). Those rates were canceled on February 1, 1949, in connection with the Rio Grande; there is no indication that the cancellation was protested.

competition with the Union Pacific, the Wabash, the Chicago & North Western, and the Missouri River connections that favor Union Pacific routing. At the present time the Rio Grande gets less than 5 percent of the traffic to and from California over the available through routes, with joint rates in connection with its line, because of competition with other routes.

A transportation specialist of the United States Department of Agriulture testified that the Rio Grande would be doing well if it obtained 1,000 cars additional annually from this traffic, an amount that is less than 1 percent of the estimated potential total traffic.

Whatever the amount, it would be the result mainly of (*a*) active solicitation by the Rio Grande to persuade shippers and receivers of freight to use its line as an overhead or bridge route, and (*b*) the value of its service to shippers. It would also depend upon the extent to which the Rio Grande and receivers of freight on its line use, and can induce shippers to use, transit facilities available on that line so as to attract the movement of commodities thereto for various purposes for subsequent reshipment beyond at the balance of the joint through rates from the point of origin. The development of such activities is of particular interest to shippers and receivers of freight on the Rio Grande. This is indicated by the growth of traffic over that railroad in the 15-year period, 1934 to 1948, inclusive, and by the testimony of shippers and receivers served by it.

Since 1934, when the Dotsero cut-off was constructed, affording a shorter route by the Rio Grande between Denver and the Utah gateways, there has been a marked increase in the traffic carried over that railroad. For the 2 years prior thereto, the total tons carried were less than 6,000,000 although the tons carried exceeded that figure in each year before that, back to 1924. Beginning in 1934, the traffic gradually increased and reached a maximum of 18,517,000 tons in the war year of 1944. In 1945 it dropped to 14,213,000 tons, but increased in 1947 to 18,331,000 tons and in 1948 to 18,473,000 tons. This tonnage has shown a considerable increase percentagewise in traffic received from connecting lines and a decrease in traffic originated. In 1924, 23.2 percent was received from connections and 76.8 percent originated. In 1934, the respective percentages were 39.3 and 60.7. In 1947, they were 49.8 and 50.2, and in 1948 they were 52.3 and 47.7 percent. This traffic in 1948 did not differ markedly from the traffic handled in the four war years 1942–45, when the percentages of traffic received from connections ranged from 52.6 percent in 1942 to 58.2 percent in 1945.

Of the traffic received from connections in the 15-year period 1934 to 1948, inclusive, the percentage terminated on the line of the Rio Grande has ranged from 16.4 percent in 1941 to 20.7 percent in

1948. In the war years the percentages were 16.7 to 19.9 percent. In the same 15-year period, of the traffic received from connections, the amount delivered to connections, that is, bridge traffic, ranged from 20.7 percent in 1935 to 39.6 percent in the war year of 1945. Excluding the war years, the percentage of traffic received from connections that was delivered to connections was 30.1 percent in 1947 and 31.6 percent in 1948. In 1934, the corresponding percentage was 21.7 percent and in 1924 it was 9 percent. These percentages show the increasing importance of the Rio Grande as a bridge line. In tons of freight carried in 1947, such traffic accounted for 5,519,239 tons out of a total of 18,331,176 tons, and in 1948 accounted for 5,846,793 tons of a total of 18,473,356 tons carried. In revenue, the Rio Grande received in 1947 from its bridge traffic $22,894,412, which was 43.3 percent of its total revenue of $52,883,339; and in 1948, $27,654,086 or 44.2 percent of its total revenue of $62,505,951.

Although the percentage relation of the traffic originated on the Rio Grande to the total traffic of that carrier has decreased, such traffic both in tonnage and revenue has increased in the same 15-year period. In 1934, the tons originated were 3,826,049 and the revenue received therefrom was $8,311,254; in 1947, the tons originated were 9,202,867 and the revenue therefrom $20,190,318; and in 1948, the corresponding figures were 8,804,334 tons and $22,018,519. The 1947 and 1948 figures exceeded those of the war years. The volume of strictly local traffic; that is, traffic both originated and terminated on the line, also increased; this traffic in 1934, for example, accounted for 2,048,544 tons and $4,351,807 in revenue, and in 1948, for 3,307,374 tons and $7,630,587. Strictly local traffic was less annually throughout the 15-year period, including the war years, than during the 6-year period 1924 to 1929, inclusive.

The reasons given for the decline or lack of proportionate growth in traffic originated are (1) depletion of nonferrous ores in Colorado and the closing of smelters, except one now operating at Leadville, Colo.; (2) decline in the amount of coal originating on the road; (3) decline in production of lumber and its products in the area served, and the discontinuance of operation by many sawmills; and (4) loss of local traffic to other forms of transportation.

The relative decline in strictly local traffic has been offset by increases in traffic originated and shipped out over connecting lines, and traffic received from connecting lines and terminated. Such traffic affords a measure of the increasing importance of the Rio Grande to the shippers and receivers of freight in the localities and areas in the States of Colorado and Utah served by it. Although percentagewise, bridge traffic in relation to the total was greater in 1948 than in 1934,

and increased by over 326 percent in the 15-year period, traffic originated or terminated also increased by substantial amounts, or over 155 percent. In terms of revenue, however, less was received from bridge traffic than from the other traffic. In 1934, for example, the Rio Grande received from bridge traffic $5,648,891, and in 1948 it received $27,654,086; from the other traffic, it received $11,519,335 in 1934 and $34,851,865 in 1948.

The record shows that both the Rio Grande and the Union Pacific sought to interest the public in the controversy and to inform other persons, especially shippers, as to the merits of their respective views. For example, the Rio Grande issued a pamphlet entitled "20 Questions" as a means of informing the public of the Rio Grande's side of the case and its reasons for seeking opening of the gateway. In its brief, the Railroad Commission of the State of Montana states that it had informal conferences with official representatives of both the complainant and the defendants before it intervened in the proceeding. A number of witnesses related that they had listened to representatives of both sides before appearing to give testimony. All witnesses were men of responsibility in their communities and were successfully engaged in their respective occupations. Many appeared and testified as representatives of large groups of producers, shippers, and receivers of freight in their areas. There is no indication that these witnesses, whether for or against the complaint, were improperly influenced, or that their respective interests in the subject matter of the controversy had been stimulated in any questionable manner.

Transit.—In transportation by rail, arrangements offered by railroads to shippers under which shipments may be stopped in transit for various commercial operations and reshipped at the balance of the joint rate from the point of origin are of great value to shippers, receivers, and distributors of freight. They are of substantial value in many marketing operations and permit a freer flow of traffic through the transit points.

The Rio Grande, like other railroads, offers a large number of such transit arrangements, including stops for partial loading or unloading, storage, processing, washing and packing fruits, sorting and consolidating commodities, concentration, milling, fabrication, assembling and distributing, and, in the case of livestock, grazing and feeding. Such arrangements are of importance to shippers and receivers in the territory served by the Rio Grande. Traffic from the excluded territory consists of perishable commodities, other agricultural products, milled products, livestock, and lumber and its products. West-bound traffic to that territory is made up for the most part of manufactures and partially manufactured articles, some of

which are stopped for storage, partial unloading at a number of points, and fabrication in transit.

On traffic from Colorado common points and points east thereof through Pueblo, Colorado Springs, or Grand Junction, and Price, Utah, to final destinations north or west of Ogden on the Union Pacific or points on its connecting lines, failure to have joint through rates in connection with the Rio Grande hinders the use of the stoppage-in-transit arrangements offered by that railroad at such Rio Grande points. Pueblo has a population of about 75,000; Colorado Springs, 50,000; Grand Junction, 17,500; and Price, 5,000. All of these are distributing points for surrounding areas. A shipper at Chicago, for example, may have a carload containing shipments for consignees at Pueblo and Boise, Idaho. If the car is partially unloaded at Pueblo, it cannot be reshipped over the Rio Grande to Boise at a joint through rate; but the car can be moved to Boise via Pueblo and Denver, thence the Union Pacific, at a joint through rate. If stops are desired on the Rio Grande at Grand Junction, Price, or Provo, for example, joint through rates would not be available.

A discussion of the evidence offered by shippers and receivers of particular commodities who testified in support of the complainant follows.

Building materials.—A dealer in and distributor of general building materials in Salt Lake City, who handles from 400 to 500 carloads annually, obtains from 150 to 200 cars from points east of Colorado common points, including cellotex from Marrero, La., roofing from Cincinnati, Ohio, doors from Louisville, Ky., hardwoods and plywoods from Algoma, Wis., and Orangeburg, N. C., asbestos products from St. Louis, and asphalt siding from Minneapolis. Distribution is made in carloads, from pool cars, and from warehouses to customers located on the Rio Grande on the western slope of Colorado, such as Glenwood Springs and Grand Junction, Colo., and in Utah, such as Price, Helper, Ephraim, and Manti; and also on the Union Pacific in northern Utah; in Wyoming, Rock Springs and west; and in southern Idaho northward to and including Ashton on the West Yellowstone branch and westward to and including Magic, Shoshone, and Buhl. This dealer cannot now serve these customers from shipments made in through cars at joint rates over the Rio Grande when such cars also carry shipments for points on the Union Pacific beyond Ogden. Ephraim and Manti are on a branch line about 52 and 59 miles, respectively, south of Thistle, Utah.

In some instances this shipper has had to forego business east of Salt Lake City at points as far as Glenwood Springs because of the rate situation. If joint through rates were established, this distribu-

tor could give customers at a number of intermediate points on the Rio Grande, who generally are small dealers and can take only less-than-carload quantities, better service through partial unloading in transit and more efficient service by frequent deliveries under more flexible schedules, instead of being limited, as at present, to furnishing service in connection with pool cars consigned to Salt Lake City as the ultimate destination. Pool cars with partial loads for that point or Ogden and points on the Union Pacific beyond do not now move over the Rio Grande, but are routed over the Union Pacific to get the benefit of joint rates.

Of the 150 or more cars annually from the east, this distributor estimated that he would have stopped for partial unloading about 25 percent. Witness made no mention of commercial competition, but indicated that his chief concern was better service to his customers and a saving in cost to his company if such carloads could be stopped for partial unloading at intermediate points on the Rio Grande while moving at the through rates to Union Pacific destinations in the area served by him.

Farm machinery.—A distributor of farm machinery and equipment at Salt Lake City receives carloads of these commodities from eastern origins, including farm tractors from Detroit, Mich., and distributes them by his own motor vehicles to points in Utah and Idaho. This business was established in 1947, at which time the production of these commodities was insufficient to meet all demands, and a system of allocations based on prior needs was introduced. While the system of allocations was in effect, it was found to be more convenient and efficient to bring all shipments to Salt Lake City and distribute them by truck. This distributor is located on the Rio Grande at Salt Lake City and all shipments move over that line. He expressed a desire for joint through rates from eastern origins to points in Utah and Idaho in connection with the Rio Grande, but admitted that no attempt was being made to partially unload shipments at points on the Rio Grande south of Salt Lake City when carloads are consigned to the latter point, or to ship over the Union Pacific to Salt Lake City where carloads could be partially unloaded or stored and later shipped to Union Pacific destinations in Utah and Idaho at joint through rates. The witness for this distributor stated that he preferred to ship in-bound over the Rio Grande and forego the stopping-in-transit provisions that are now in effect at Salt Lake City and other points on the Union Pacific when traffic is routed over that line.

A factory branch of a large manufacturer of farm machinery and equipment which distributes in the intermountain area is located on the Rio Grande at Salt Lake City. In 1949 it received 369 carloads

from its eastern manufacturing points. Of these, 70 percent were sold at points north of Salt Lake City, mostly at points served by the Union Pacific as far as Ontario, Oreg., and the remainder in Utah and western Colorado. About one-half of the shipments to Salt Lake City moved over the Rio Grande route and one-half over the Union Pacific. Shipments which move in over the Union Pacific may be stopped at Salt Lake City for partial unloading or storage in transit at the joint through rates when the ultimate destinations are on the lines of that carrier, but combinations of rates to and from Salt Lake City apply when such shipments move into that point over the Rio Grande. The manager of this branch testified that it would be desirable to establish joint through rates over the Rio Grande so that shipments moving over that line could be stored in transit at Salt Lake City and later reshipped, or partially unloaded thereat and the remainder forwarded, to points on the Union Pacific at charges no greater than apply on similar shipments moving over the Union Pacific. However, he did not know what effect this would have on the parent company, as some shipments have been routed over the Rio Grande when Union Pacific routing was requested. To indicate a need for joint through rates, reference was made to a shipment of tractors which were routed over the Rio Grande to Salt Lake City. At that time a customer at Ontario needed two tractors, and it cost about $50 each to ship them from Salt Lake City by motor carrier. If joint through rates had been in effect, the car could have been partially unloaded at Salt Lake City and the two tractors could have been forwarded to Ontario at the joint rate from origin to Ontario. The record fails to show the difference in the joint rates to Salt Lake City and to Ontario. On a 34,000-pound shipment of tractors from Chicago, the joint through rate is $2.68 to Ogden and $2.98 to Boise, which is southeast of Ontario, representing a difference of $102 in charges.

Monuments.—A fabricator and wholesaler of granite and marble monuments at Brigham City, Utah, on the Union Pacific 21 miles north of Ogden, obtains his stone from Vermont, Georgia, Wisconsin, and Minnesota and sells in Colorado, Utah, Idaho, Wyoming, Montana, Oregon, and Washington. This dealer has keen competition with dealers in like articles in Salt Lake City. Its business is such that straight carloads rarely can be shipped to retailers. If joint through rates were established over the Rio Grande through Ogden, cars could be stopped in transit at Colorado points, such as Grand Junction. A retailer at the latter point testified that he finds it impracticable, except in unusual instances, to purchase the various kinds of monuments needed in the trade in carloads, and that the keen

competition cannot be met when shipments are made in less than carloads. There is thus an urgent need for the establishment of joint through rates on this traffic to destinations in the excluded territory with stop-off privileges at intermediate points on the Rio Grande. A substantial portion of this traffic has been lost to the trucks, chiefly because of rate differences and the lack of stop-off privileges on the Rio Grande at competitive through rates.

Livestock.—Large volumes of traffic are involved in connection with the livestock industry and with the processing and marketing of agricultural products. With respect to livestock, evidence was submitted by producers, feeders, and marketers. A number of producers in the northwest area, particularly in Idaho at such points as Pocatello, Burley, Soda Springs, and Blackfoot, desire joint rates via Ogden and the Rio Grande to markets in Denver, Pueblo, and east thereof on the same basis that applies on shipments moved over the Union Pacific through Cheyenne. Much of the evidence dealt with the advantages from such joint rates when applied on livestock shipped to grazing and feeding areas in Utah and Colorado on the Rio Grande for reshipment beyond under transit arrangements. In the areas in Utah and Colorado served by the Rio Grande are good pasture lands for grazing livestock. In addition to livestock produced locally in those areas, substantial quantities are shipped in the summer season from other sections in Colorado, Utah, and surrounding States, both for feeding in feed lots and pastures and for grazing on the livestock ranges. Movements of livestock, both sheep and cattle, into and out of Colorado are substantial in volume.

Evidence as to the needs of raisers of livestock and operators engaged in fattening livestock for markets was submitted by persons engaged in those pursuits, individually and as representatives of livestock and feeder associations. These came from several representative points or districts served by the Rio Grande, such as Heber City and La Sal, Utah, and Burns, Lamar, and Las Animas, Colo. Those served only by the Rio Grande generally buy from areas from which joint rates apply in connection with that road in order to obtain the benefit of grazing or feeding in transit on feeder stock when the fattened animals are shipped to Denver or markets east thereof. The evidence shows that such operators have to absorb the difference in transportation costs and are not able to purchase cattle or sheep economically in the northwest area in competition with buyers from Iowa, Wyoming, Nebraska, Colorado, and Kansas that have the benefit of competitive joint rates from the excluded territory over Union Pacific routes with grazing or feeding in transit arrangements.

Due to the curtailment of the use of grazing lands in national forests in Colorado, as part of a general policy for all such forest

lands, livestock raisers in Colorado have curtailed their operations in raising livestock, and have engaged more in fattening stock by grazing in private pastures or feeding in feed lots. They purchase most of their feeder stock in Colorado and surrounding areas, but for supply, quality, and price reasons they have been seeking some feeder stock from more distant origins, and the need for doing so, particularly by reason of the curtailment of the pasture area, has been increasing. Livestock produced in the northwest area, particularly in Idaho, Montana, and Oregon, is of excellent grade, does well on the range, and is considered very desirable for feeding and breeding purposes. About 90 percent of the sheep produced in Colorado are produced in the area served by the Rio Grande, and the operators in this territory purchase replacement or breeding ewes in the excluded territory for summer grazing and the production of white-faced or mutton-type lambs. One witness indicated that in-bound billing on breeding ew s is used under the feeding-in-transit arrangements, when available, at points on the Rio Grande when the newborn, fattened lambs are shipped to markets, but the feeding-in-transit arrangements apparently do not apply for breeding in transit.

Operators on the Rio Grande in western Colorado and those in the eastern Arkansas Valley sections (in southeastern Colorado east of Pueblo and in southwestern Kansas) feel that they cannot now profitably purchase stock in the excluded territory for feeding in transit in competition with similar operators on the Union Pacific in Wyoming, Colorado, Nebraska, and Kansas, due to the rate situation. For example, from Dillon, Mont., to Kansas City the rate on sheep or goats in double-deck cars is $1.21 over the Union Pacific direct and $1.40 over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond, a difference of 19 cents. The 19-cent differential over the latter route applies generally on sheep and goats from Union Pacific origins in the excluded territory to Missouri River markets and points east thereof. These rates are published as joint rates over through routes via Ogden and the Rio Grande. On sheep and goats to destinations west of the Missouri River, including Colorado common points, and on cattle to all of the territory Colorado common points and east theref, via Ogden and the Rio Grande, the rates are on a combination basis. Cattle and sheep may be shipped from the excluded territory over the Union Pacific to Denver and connecting lines beyond to points in the Arkansas Valley, such as Lamar, for feeding in transit and subsequent reshipment to Missouri River markets, or markets east thereof, at the rates applicable over the Union Pacific direct to the Missouri River markets, plus an arbitrary of 8.5 cents per 100 pounds. Feeders of livestock located on the Union Pacific in northern Colorado and Nebraska are

now able to overbid the Arkansas Valley feeders on northwest stock when destined to the Missouri River and east thereof, and the latter are thus unable to compete successfully because of their unfavorable rate situation. The northern Colorado-Nebraska operators feed a majority of the lambs fattened for market in the United States.

A packing plant at Pueblo purchases lambs at the Ogden market, some of which originate at points on the Union Pacific in Idaho and Oregon. These shipments are routed over the Rio Grande from Ogden even though it costs from $70 to $80 per car more than the total charges would be if the shipments were routed over the Union Pacific to Denver at the transit balance of the through rate. The Rio Grande is used from Ogden because shipments do not have to be stopped for feed and water en route to Pueblo, whereas shipments routed from Ogden over the Union Pacific usually require feed and water at Denver. There is less shrinkage on shipments moved over the Rio Grande, but not enough to offset the additional freight charges.

The rates on livestock in western territory were prescribed in *Livestock, Western District Rates*, 176 I. C. C. 1, 190 I. C. C. 175, 190 I. C. C. 611, 200 I. C. C. 535. Generally, the rates are predicated on the shortest routes over which carload traffic can be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15 (4) of the act. The rates on stocker or feeder livestock were prescribed on a basis not in excess of 85 percent of the rates prescribed on the same kind of stock when fit for slaughter, and the carriers were authorized to establish tariff provisions which allow stock moving toward a market to be fed in transit at intermediate points on the basis of the through rates plus a reasonable charge for such privilege. On December 6, 1932, the Rio Grande was authorized (190 I. C. C. 175) to add certain arbitraries to the rates prescribed for mountain-Pacific territory for hauls over its standard-gage lines between Pueblo and Walsenburg on the east, and Provo on the west, including branch lines connecting with the main lines between those points. For hauls of 500 miles or more, the arbitrary authorized at that time was 6 cents on cattle and on hogs and sheep, double deck. Later, these same arbitraries were authorized for application between Denver and Provo over the Dotsero cut-off (200 I. C. C. 535).

In establishing the prescribed rates on livestock, the carriers appear to have limited their application over routes which do not result in short hauling, and over other and longer routes to have provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the dis-

tance involved. As indicated, operators in the Arkansas Valley may now obtain cattle and sheep in the excluded territory for feeding in transit at an arbitrary of 8.5 cents, and this same arbitrary applies when the stock originates on the Burlington in Montana and Wyoming. On the other hand, such operators may obtain feeder stock in other areas, such as Texas and New Mexico, for feeding in transit and reshipment to the Missouri River markets or markets east thereof, at lower rates than would apply if the same stock were fed in transit by operators on the Union Pacific in Colorado, Nebraska, or Kansas. For example, the rate on cattle from Las Vegas, N. Mex., to Chicago is $1.13 when stopped for feeding at Lamar, but if the same cattle were fed at Barton, Nebr., just east of Julesburg on the Union Pacific, the rate would be $1.26, of 13 cents higher. On cattle from Raton, N. Mex., fed in transit at Lamar, the rates are $1.07 to Chicago and 76 cents to Kansas City, but if the same cattle were fed in transit at Barton the rates would be $1.21 and 89 cents, respectively. Many other examples of a similar nature are shown.

The arbitrary of 19 cents, originally 13 cents, applicable on lambs from the northwest area and moving over the Union Pacific to Ogden, the Rio Grande to Denver, and the Union Pacific beyond was established prior to the opening of the Dotsero cut-off, and was based in part on the mileage over the Rio Grande via Pueblo. The evidence indicates that this arbitrary was based on the difference between the prescribed scale rates for the average distance from 12 representative origins, on the line of the Union Pacific from Pocatello north to Butte and west to Pendleton, to the several Missouri River markets over the Union Pacific direct and over that road to Ogden, the Rio Grande to Denver via Pueblo, and the Union Pacific beyond. Using the same formula, but giving consideration to the shorter distance over the Rio Grande's Dotsero cut-off, the Union Pacific states that the arbitraries on traffic routed over the Rio Grande should be 5 cents to Denver and Pueblo and 15 cents to the Missouri River markets, and it is willing to establish these arbitraries and make them applicable to cattle as well as sheep. The arbitrary of 8.5 cents on cattle and sheep from origins on the Union Pacific and the Burlington when fed in transit at points in the Arkansas Valley and reshipped to the Missouri River and beyond apparently is based on a similar formula. Reasonable groupings were authorized in *Livestock, Western District Rates, supra.*

In seeking to have the rates on livestock which apply over the Union Pacific made applicable over its lines from Ogden, the Rio Grande indicates a desire to waive the arbitraries which were authorized over its line from Provo to Denver and Pueblo and, in addition, to have estab-

lished over its routes lower rates than would result from the application of the prescribed scales for the distances over its routes. On shipments moving over the Union Pacific-Ogden-Rio Grande route, this would result in short hauling the Union Pacific by 512 miles to Denver and 1,042 miles to Kansas City, which are the differences in the Union Pacific distances from McCammon to Ogden and from McCammon to Denver and Kansas City.

Reference is made to *Crouch* v. *Nevada N. Ry. Co.*, 208 I. C. C. 586, which concerned the rates on feeder cattle moved from East Ely, Nev., to Davis, Calif., over the lines of the Nevada Northern Railway Company to Shafter, Nev., thence the Western Pacific to Sacramento, Calif., and the Southern Pacific beyond, 760.4 miles. A rate of 47.5 cents was applicable over the Nevada Northern to Shafter and the Southern Pacific beyond, 705 miles. This rate was collected, but the defendants later sought to collect a rate of 58 cents, which was the combination rate based on Sacramento. Division 4 found that the combination rate was applicable but unreasonable to the extent that it exceeded 49.5 cents, which was the prescribed scale rate for distances of 775 miles and over 750 miles. See also *Routing Livestock to and from Oregon Points*, 209 I. C. C. 349. We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive rates over the Rio Grande via the Ogden gateway.

Agricultural commodities.—Growers of wheat, potatoes, onions, peas, other vegetables, and fresh fruits at Idaho Falls, Burley, Twin Falls, Blackfoot, Aberdeen, Caldwell, and Parma on the Union Pacific, and also those engaged at such points in buying, selling, packing, and distributing vegetables and fresh fruits, market such products throughout the United States. In order to get as wide a distribution as possible those growers and other growers in the northwest area need as many markets and outlets as possible.

In marketing the large production of such products, particularly Idaho potatoes, it is the general practice to divert carloads in transit as markets are found and sales are made. Routes over which joint through rates apply are generally used so that a shipment can be diverted or reconsigned without the application of a combination of rates. If a shipment reaches a point through which a combination of rates applies and the sale is lost, it is frequently necessary to dispose of the shipment at that point at a forced or distress price. Such points are called closed or pocket markets.

The principal outlets for Idaho fruits and vegetables vary from year to year, but large markets are in the Central, Southwestern, and Southeastern States. Carloads moved over the Union Pacific to the

Central States can be diverted to the Southeastern States at the joint through rates if they move east through Omaha, Kansas City, St. Louis, or Chicago, but if the cars are routed to points in the Southwest over the Union Pacific and connections through Denver they cannot be diverted to southeastern markets east of New Orleans at joint through rates. The southwestern markets are pocket markets in that respect. Idaho producers are in competition with shippers in other producing areas and find it difficult to compete on shipments routed over the Rio Grande via Ogden or Salt Lake City. One Idaho shipper has made few sales of potatoes in the Southwest in the last several years because of pocket markets there.

Wichita and Liberal, Kans., are described as pocket markets on potatoes and other vegetables originating in Idaho because they cannot be diverted or reconsigned therefrom to points east of the Missouri River at joint through rates. However, the record indicates that shipments refused at these two points may be diverted or reconsigned to destinations in the Southwest at the joint through rates. Wichita is not located on the direct line of any carrier operating between the Colorado common points and the Missouri River gateways, and Liberal is located in the southwestern part of Kansas near the Oklahoma border. Shipments to Kansas City and east thereof would require an out-of-line haul via Wichita and a substantial back haul via Liberal.

Storage facilities are available at Pueblo for the storage of perishables, including potatoes, onions, apples, pears, frozen poultry, frozen foods, butter, and eggs. Joint through rates are applicable from the excluded territory via Pueblo on shipments routed over the Union Pacific to Denver and connecting lines beyond to destinations in the Southwest and to points west of the Missouri River. The route of the Rio Grande from Ogden would be used if joint through rates were available over that route to additional destinations with storage in transit at Pueblo. Storage operators at Pueblo are now handicapped, in relation to two competitors at Denver, because the through rates do not apply via Pueblo to Denver and other northern destinations where a back haul would be required on shipments routed to Pueblo via Denver, whereas the competitors can ship at the through rates in all directions, except westward. The application of the through rates via Ogden and the Rio Grande is sought so that these shippers may have available the same distribution markets as their competitors.

A shipper who deals in dried beans from Idaho and other Western States is located at Colorado Springs. His principal markets are in southeastern territory. Beans which originate in California, Colorado, and Wyoming may be stopped at Colorado Springs for cleaning and packaging and reshipped at the balance of the joint through rates.

Beans which originate in Idaho may be shipped over the Union Pacific to Denver and the Rio Grande or other connections to Pueblo and reshipped therefrom at the balance of the through rates, except to points east of the Missouri River. The route of the Rio Grande from Ogden would be used on Idaho beans if it would result in the application of joint through rates to points east of the Missouri River on the same competitive basis as is now applicable when such beans are transited at points on the Union Pacific. Another bean dealer at Fruita, Colo., on the Rio Grande about 10 miles west of Grand Junction, would like to transit Idaho beans on the same competitive basis as is applicable at Union Pacific points. This dealer is now engaged primarily in buying pinto beans from growers in the vicinity of Fruita and shipping them in carload lots to others, including the shipper at Colorado Springs. These dealers in dried beans are in competition with like dealers at points on the Union Pacific who have the benefit of transit at the through rates to destinations, among others, east of the Missouri River.

A company which is engaged in the purchase and sale of dried beans and peas maintains plants in Nebraska at Morrill on the Burlington and at Gering on the Union Pacific. Carloads of dried beans and peas originating in California, Utah, Oregon, Washington, Idaho, Colorado, Wyoming, Montana, and Nebraska are shipped to Morrill and Gering where they are cleaned, sorted, and packaged, and reshipped generally eastward and to Oklahoma and Texas. This company can obtain Idaho beans and reship them from Gering to eastern and southern destinations at the joint through rates. It was stated, however, that a substantial amount of pinto beans (about 6,000,000 pounds per year) are obtained from Colorado, mostly on the Rio Grande, on which an out-of-line charge of 7 cents per 100 pounds is applicable in addition to the joint through rates over direct routes when such beans are processed at Gering and reshipped to the Missouri River and points east thereof; also that when such beans are processed at Gering and reshipped to destinations west of the Missouri River, combinations of rates to and from Gering are applicable.

The Utah Growers' Cooperative operates throughout Utah in the production and shipment of vegetables, including potatoes and onions. It has two branches on the Union Pacific and three on the Rio Grande in Utah, the latter at Midvale, American Fork, and Springville, all south of Salt Lake City. These three points are served by the Union Pacific and the Rio Grande, but track connections exist only at Midvale. Shipments of box shooks and of seed potatoes from Idaho and of fertilizer from Montana may move into American Fork and Springville over the Union Pacific at lower rates than when they are

interchanged with the Rio Grande at Ogden or Salt Lake City, but when they are received over the Union Pacific they must be trucked to the plants on the Rio Grande. The differences in the rates are not shown.

Various flour mills at southern Kansas points, such as Moundridge and Wichita, support the complaint because they cannot at present purchase wheat at points on the Union Pacific in Idaho, Oregon, and Washington, mill it in transit, and reship to the Missouri River and points east thereof at the same rates that are applicable when similar wheat is milled at points on the Union Pacific. A specific instance was shown where nine carloads of wheat moved from Ogden to Moundridge on which the Ogden shipper applied in-bound transit billing on wheat originating at Idaho Falls. The shipments moved from Ogden over the Union Pacific to Denver, the Rio Grande to Pueblo, and the Missouri Pacific beyond. Moundridge is a local point on a branch line of the latter carrier north of Eldorado, Kans. After the wheat was milled at Moundridge the in-bound billing thereon was applied against an out-bound movement of flour to New Cumberland, Pa. The rate on flour from Idaho Falls to New Cumberland over the route of movement through Denver and Moundridge was $1.335, or 12.5 cents higher than the rate would have been if the same wheat had been milled at a point on the Union Pacific. The distances over the route of movement through Denver and Moundridge and the more direct route of the Union Pacific are not shown.

The rate restrictions complained of by shippers of and dealers in fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from the excluded territory to Colorado common points and east thereof have placed these shippers and dealers at a serious disadvantage in marketing their products, as compared with competing shippers and dealers located on the Union Pacific and having the benefit of the lower joint through rates from and to the same points. Some of these restrictions complained of, such as those by operators of flour mills in southern Kansas, could be remedied by the establishment of additional joint through rates from the excluded territory over routes of the Union Pacific to Denver and connecting lines beyond. From McCammon and points north thereof such routes would in all instances be shorter than the routes over the Union Pacific to Ogden, the Rio Grande to Denver or Pueblo, and connecting lines beyond. The Union Pacific states that it has not been requested to establish additional joint through rates via Denver. Its position with respect thereto is that the rates on agricultural commodities are on a low basis and, therefore, the carriers should be permitted to limit their application to more direct routes, thereby maintaining their long

hauls and preventing undue circuity. For example, it believes that if competitive joint through rates were established on grain for milling at Wichita and other southern Kansas points and reshipment beyond to the Missouri River and east, other and longer routes probably would be demanded on the same basis at points in Oklahoma and Texas where competing mills are located.

The establishment of additional routes and rates by way of the Union Pacific, however, would not remedy the disadvantage complained of by the shippers of and dealers in these products in the excluded territory who are compelled to pay combination rates on shipments diverted or reconsigned at intermediate points on the Rio Grande, including those stored at Pueblo or Colorado Springs on that road, and reshipped to Colorado common points and east thereof. The only effective remedy in those instances would appear to be the establishment of through rates, the same as those over the Union Pacific routes, over Rio Grande routes via Ogden or Salt Lake City.

Lumber.—A number of lumber dealers and lumber mills are located at Grand Junction and other points, and a wood-treatment or preserving plant is located at Salida, Colo., all on the Rio Grande. Generally, the complaints of these parties relate to their inability to ship lumber and millwork from the excluded territory on competitive joint rates via Ogden and the Rio Grande with stoppage in transit for partial unloading, storage, milling, or treatment and reshipment beyond to Colorado common points and east thereof at the balance of the joint rates. Mention also was made of a handicap in diverting or reconsigning at the joint rates to such points carloads originally shipped to local stations on the Rio Grande via Ogden. As previously indicated, joint through rates apply on lumber and millwork from points in California and in Oregon and Washington west of the excluded territory, including areas around Seattle, Tacoma, and Portland, over the Southern Pacific or the Western Pacific and the Rio Grande through the Utah gateways to points on the Rio Grande and east thereof, with storage, milling, and treatment under transit arrangements. Lumber may also be shipped at joint through rates from the excluded territory when the final destinations are local points on the Rio Grande, but such rates are not applicable from that territory over the Union Pacific to Ogden and the Rio Grande when the final destinations are Colorado common points or points east thereof, whether the shipments move direct or are stopped for milling or other transit purposes.

A lumber company with a wholesale yard, a box factory, a mill, and a storage and drying yard is located at Grand Junction. This company buys most of its lumber, both rough and dressed, and plywood and doors at points west of the excluded territory and sells in Colorado

and points east and south thereof. This company also has a financial interest in a wholesale lumber company at Colorado Springs. It has purchased some lumber at points in the excluded territory, such as Cascade and Winchester, Idaho, Burns, Oreg., and Metaline Falls, Wash. Lumber shipped from Cascade, Winchester, and other points in the excluded territory over the Union Pacific to Ogden and the Rio Grande to Grand Junction could not be stored in transit at the latter point and later reshipped to Colorado common points or points east thereof at the joint through rates as those rates apply only over the Union Pacific routes.

Another lumber company on the Rio Grande at Military Junction, Colo., about 10 miles south of Denver, purchases lumber in California and Oregon; also a small amount in Washington, for milling in transit and reshipment beyond. Lumber from the excluded territory can now be milled in transit at Military Junction and reshipped to Colorado points south thereof and to points in the Southwest at the joint through rates to final destination, but this is not true to other destinations east of the Rocky Mountains. Military Junction is about 1 mile outside of the Rio Grande's switching limits at Denver.

The wood-treatment plant at Salida purchases some lumber, poles, piling, and cross ties in Colorado, Utah, and New Mexico, but most is obtained from points in Oregon and Washington west of the excluded territory. This plant has a contract for treating cross ties for the Rio Grande, but about 60 percent of the forest products which it treats are reshipped to points outside of Colorado. It has not purchased products in the excluded territory, but probably would do so if the joint through rates to eastern and southern destinations were made applicable over the Union Pacific to Ogden and the Rio Grande through Salida. The company which owns the plant at Salida has a similar plant at Denver and 22 others scattered throughout the country. The plant at Denver can perform treatment in transit at the joint through rates from the excluded territory to final destinations in the East, South, and Southwest, and apparently joint through rates apply on about 40 percent of the business at Salida which does not move outside of Colorado.

OPPOSITION TESTIMONY

The Union Pacific operates about 9,724 miles of railroad serving over 1,700 points in 13 States.[7] It reaches the Pacific coast at Seattle, Portland, and Los Angeles, and the Missouri River at Council Bluffs, Iowa, and Kansas City. Its line between Pocatello and North Platte,

[7] Iowa, Nebraska, Wyoming, Idaho, Oregon, Washington, Missouri, Kansas, Colorado, Montana, Utah, New Mexico, and California.

Nebr., the point of divergence of traffic via Council Bluffs and Kansas City, runs through a substantial portion of the territory principally involved in this proceeding. It has over $600 million invested in the routes concerned. Its present facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future.

Evidence of the amounts expended by the Union Pacific for improvements in line, heavier tracks, yard facilities, traffic control, and other facilities, and as to its capacity and efficiency in operation, shows that the railroad has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line.

The maximum elevation on the Union Pacific route between Pocatello and Cheyenne is 8,013 feet at Sherman, Wyo., for 1 mile, as compared with the maximum elevation of 9,239 feet between Ogden and Denver on the line of the Rio Grande, which operates at an elevation of 8,000 feet or more for about 35 miles. East-bound on the Union Pacific the maximum grade at any point is 1.52 percent and westbound 1.55 percent. The Rio Grande's maximum grade is 2 percent over substantial mileage. There is much greater curvature in the Rio Grande line than in that of the Union Pacific. The total rise and fall in feet on the Rio Grand is 66.3 percent greater than that of the Union Pacific. Other data as to the physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services.

The Union Pacific objects to the establishment of joint through rates to points beyond Denver or Pueblo via Salt Lake City or Ogden over the Rio Grande upon the principal grounds that such routes would short haul the Union Pacific and that the diversion of traffic over such route from the Union Pacific routes now available would curtail the service and growth of the Union Pacific in the territories it alone serves and in which it pioneered in railroad construction. Such diversion, it fears, would adversely affect the operation of its numerous branch lines in Idaho, Montana, Oregon, and Washington, which are feeders for its main line and are not self-sustaining. In those States the Union Pacific operates a total of 5,606 miles of railroad, with 2,913 miles of branch lines upon which about 46 percent of the total traffic in that territory originates or terminates. It contends that unless it has a substantial main-line haul on branch-line traffic, the operation of many, if not most, of such branches would not long be justified.

Another objection is that yard facilities of the Ogden Union Railway and Depot Company, referred to as the Depot Company, jointly owned by the Southern Pacific and the Union Pacific, at Ogden terminal are inadequate to interchange any additional volume of traffic with the Rio Grande that may be routed to or from the northwest area through Ogden, and that expansion of facilities there is not possible. Several instances of delays to trains, particularly in the fall when traffic is heavy, are shown. The record describes in detail the yard and track lay-out at this terminal and interchange point. At present the Union Pacific finds it necessary to bypass the Ogden terminal as much as possible by taking its trains for Pocatello, Salt Lake City, or Green River over an outside wye track which avoids the terminal proper. In addition to these deficiencies, icing facilities now maintained at Ogden for east-bound and west-bound traffic are not considered adequate for icing perishable commodities from Idaho and the Pacific Northwest for delivery to the Rio Grande. The Depot Company estimated that the cost of interchanging cars between the Rio Grande and the Union Pacific and Southern Pacific is at least twice the average cost of cars in the terminal because of the additional handling required.

The largest volume of traffic was moved through the Ogden terminal in the war year 1945, when a total of 2,847,277 cars were handled. In July, the peak month in that year, the total was 284,711 cars in 2,966 trains, an average of 96 trains daily, which required an average of 70 switching shifts a day. Of that number in July, 894 were solid trains that moved through the terminal without switching. The handling of such a large volume caused considerable congestion and delays to trains. In 1949, the total number of cars handled was 1,955,219. In the peak month of that year, 2,359 trains were handled, an average of 76 trains per day, requiring about 59 switching shifts daily. These figures show that 892,058 fewer cars were handled in 1949 than in the peak year of 1945.

To show that the Union Pacific cannot afford to lose any part of its haul on traffic, attention is directed to the large deficits which the Union Pacific incurred in its passenger service. In 1948, that deficit amounted to $28,462,000, equivalent to $4,291 per mile of road operated, as compared with a passenger deficit incurred by the Rio Grande of $4,954,000, equivalent to $3,127 per mile of road. In the last 20 years the Union Pacific in only 6 years, principally in the war years, has had railway operating income sufficient to pay fixed charges plus declared dividends, and in 1949 it had a net railway operating income of $21,707,437, which was not sufficient by $10,269,865 to pay declared dividends and interest on funded debt. This is contrasted with the

results on the Rio Grande, which in 1948 had a net railway operating income of $12,156,284, out of which it provided for all fixed charges, paid a declared dividend, provided for sinking-fund requirements, and had left for its surplus account $5,167,148.

The Wabash and the Chicago & North Western, important eastern connections of the Union Pacific, furnished estimates of the possible loss of traffic to those roads, and its effect upon train service and employment on their lines in the event that the volume of traffic embraced in the Rio Grande estimate of potential traffic were diverted over the Rio Grande route.

The Wabash in 1948 participated in 9.07 percent of the total traffic handled by the Union Pacific from the Northwest and about one-half of that on west-bound traffic to that area. It estimates the value to it of the potential traffic which it might lose at $1,602,000.

The revenue derived by the Chicago & North Western from the traffic to and from the northwest territory handled in connection with the Union Pacific in 1948 was about $4,000,000. Based on the loss of the potential traffic as estimated by the Rio Grande, it urges that it will lose that amount of revenue if the joint through rates sought in this proceeding are established.

The Great Northern, Northern Pacific, Santa Fe, and Milwaukee oppose granting the Rio Grande's request for the establishment of competitive joint through rates via Ogden. Neither of these defendants, except the Santa Fe, connects with the Rio Grande. They participate, however, in joint rates with the Union Pacific on traffic between the northwest area and eastern points, but there are numerous exceptions. For example, from origins on the Great Northern joint rates are not applicable via Spokane and the Union Pacific on wool, livestock, ores, concentrates, or smelter products, and the joint rates east-bound on fruits and vegetables over that route are limited to destinations reached by the Union Pacific. These restrictions became effective on September 15, 1932, although they were protested by various shipping interests. On lumber from origins on the Great Northern, joint rates apply over that line to Spokane and the Union Pacific only when the traffic is destined to points on and west of the Missouri River, Council Bluffs to Kansas City, thence the line of The Kansas City Southern Railway Company to the Gulf of Mexico. Reference is made also to *Transcontinental Traffic Routed via Bieber, Calif.*, 213 I. C. C. 487, wherein the Great Northern was permitted to cancel joint rates via Bieber and Salt Lake City on transcontinental traffic originating at or destined to various points on the Great Northern in Idaho and Washington.

The Milwaukee, the Santa Fe, and the Wabash, in a joint brief, contend, as does the Great Northern, that upon the evidence submit-

ted the establishment of joint rates which would short haul the defendants is not warranted.

A large number of shippers and representatives of communities served by the Union Pacific, and traffic associations, opposed the complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah, and Colorado. Those three supported the complaint in whole or in part, and as indicated, the Kansas commission later qualified its opposition by supporting the position of the complainant insofar as it pertains to wheat and livestock.

It is not practicable to deal with all of this evidence in detail, but the testimony and position of the parties have been considered. Most of the shippers in opposition to the complaint commented upon the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. Many of them testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event. Most of the opposition arises from the assumed effects of the diversion from the Union Pacific of the full amount, or a very large portion, of the traffic estimated by the Rio Grande as the potential traffic that would be subject to solicitation by that carrier for movement over its lines if the joint rates sought should be established. Upon the assumption that the Union Pacific would lose its long haul on the full estimated potential traffic of 101,476 carloads originated and 56,286 carloads terminated annually on the Union Pacific in the four Northwestern States, a total of 157,762, that number was used as a base by the Union Pacific to determine possible revenue losses. These were computed as amounting, in the aggregate, to $49,880,000 yearly.

Diversion of traffic with such a large loss in revenue would result, according to Union Pacific estimates, in (*a*) the discontinuance of four trains daily east-bound and four trains daily west-bound between Pocatello and North Platte; (*b*) three trains east-bound and three west-bound daily between North Platte and Council Bluffs; and (*c*) one train east-bound and one west-bound daily between North Platte and Kansas City. Extending this loss to show the direct effect upon employment, it was calculated that 1,240 employees, with annual payroll earnings of $5,000,000 yearly, would be laid off, with additional losses in employment by employees in other departments, bringing the total to about 5,300. Other losses are calculated, such as loss of employment of Union Pacific employees engaged in moving fuel coal from the company's mines in Wyoming. Based on

these assumptions, derivative losses were computed by communities and localities on the Union Pacific's line whose local industries and merchants depend more or less upon the wages paid to railroad employees.

Considerable evidence of the same general character was submitted by representatives of employees of the Union Pacific, to show the effect upon them if all of the potential traffic were routed via Ogden and the Rio Grande. The number of employees that might be laid off was computed as 5,144, with a total loss of wages of $21,080,400. Losses by reason of possible loss of homes due to forced changes in places of employment, decline in real-estate values, and other contingent losses were calculated. Similar figures for possible loss of employment were calculated for certain lines connecting with the Union Pacific, such as the Wabash, the Chicago & North Western, and the Milwaukee.

The record contains detailed computations and estimates upon all of these matters. Employee representatives contend that if joint rates are required to be established we must determine what would be the probable extent of diversion of traffic from one or more routes to the route via Ogden and the Rio Grande. Based on such a finding, they further contend that we must determine the probable adverse effects of the diversion on employees of the railroads affected and impose measures to compensate or to protect such employees from loss, as conditions upon the establishment of the joint rates and through routes.

There is no specific provision in section 15 (3) or (4) requiring that such conditions be imposed, but it is argued that in finding joint rates and through routes necessary and desirable in the public interest, as required by section 15 (3), the interests of employees must be considered as they are in proceedings involving consolidations, mergers, and abandonments. Reference is made to the decision in *Cancelation of Rates and Routes via Short Lines*, 245 I. C. C. 183. In that proceeding certain carriers sought to cancel their joint rates over through routes with specified short lines. It was found that cancellation of the rates and routes would result in abandonment of the short lines with resulting inconvenience and loss to shippers and to carrier employees. Permission to cancel certain of the routes was denied.

Upon the record before us it is impossible to find definitely, or to estimate with any degree of accuracy, how much traffic might be diverted to the Rio Grande if all of the rates sought were to be made applicable over that carrier, nor how much traffic will be diverted to the Rio Grande under the restricted findings herein made. Shippers have a right to route their own traffic, and where traffic is not routed

by the shipper, the originating carrier has the right to control the routing within certain limitations.

GENERAL DISCUSSION AND ULTIMATE FACT FINDINGS

In support of its contention that the assailed rates over its line are unreasonable, the Rio Grande submitted a large number of comparisons showing the differences in such rates and the competitive joint through rates on various commodities, together with the car-mile and ton-mile revenue under the respective rates and what the revenue would be if the lower joint rates were made applicable over its line. Neither factor of the combination rates is assailed, but the aggregates of such factors are alleged to be unreasonable to the extent that they exceed the competitive joint rates.

Many of the present joint rates on the transcontinental traffic here affected are commodity rates which were established originally on particular commodities to meet water competition. Others, such as those applicable on agricultural commodities, were established from producing areas in the excluded territory to enable growers and shippers to market such commodities in eastern and midwestern territories. For these reasons, and others, the defendants contend that it would be unreasonable to require the application of the joint rates over the Rio Grande, as it would result in depleting their revenues and in wasteful transportation over circuitous routes, as well as in short hauling the defendants, especially the Union Pacific. For example, the rates on potatoes to Chicago are 96 cents from Monte Vista and Greeley, Colo., and $1.14 from Idaho Falls, Idaho, a difference of 18 cents, although the distance from Idaho Falls to Chicago, 1,597 miles, is 315 miles greater than from Monte Vista and 590 miles greater than from Greeley. Computations were submitted which indicate that on a carload of potatoes weighing 45,120 pounds from Idaho Falls to Chicago the joint rate of $1.14 would yield a net profit of $1.97 per car when moved over the Union Pacific to Omaha and the Chicago & North Western beyond, and a net loss of $62.93 per car if routed over the Union Pacific to Ogden, the Rio Grande to Denver, and the Burlington beyond, 1,809 miles. The computed costs were based on general cost scales compiled by our Bureau of Accounts and Cost Finding and were not based on studies of particular movements of traffic over the respective routes. Many other examples of this nature were submitted.

With unimportant exceptions, the only rates of record with which comparison is made by or in behalf of the complainant are the joint rates in effect over routes embracing the lines of the Union Pacific which are sought for application over the lines of the Rio Grande and

the Union Pacific via Ogden or Salt Lake City. As above indicated, many of those rates are the result of competition. However, they are the going rates on this traffic and, except for authorized general increases therein, have been in effect for many years. There is no claim that any of those rates is below a minimum reasonable level. It follows that the joint rates sought, as presently applied, are within the zone of reasonableness and must be regarded as reasonable rates.

With respect to the issue under section 15, the facts before us here are in some respects similar to those considered in *United States* v. *Union Pac. R. Co.*, 28 I. C. C. 518, and *Western Pac. R. Co.* v. *Northwestern Pac. R. Co.*, 191 I. C. C. 127, in both of which the complaints were dismissed. In the first, the complainant sought through routes and joint rates over the Rio Grande, among others, in connection with the Santa Fe at Pueblo or Denver on the east and the Oregon Short Line at Salt Lake City or Ogden on the west, on traffic moving between Chicago and certain Mississippi and Missouri River points, on the one hand, and stations on the Oregon Short Line, on the other. The joint rates sought were the same as those then in effect over generally shorter routes of the Union Pacific and other defendants. The short-hauling provision of the statute was held to be a bar to the establishment of the routes and rates sought.

In the second proceeding, the Western Pacific alleged that the failure of the defendants to join with it in the establishment and maintenance of joint rates between points in California on the Northwestern Pacific Railroad Company, controlled by the Southern Pacific, on the one hand, and eastern defined groups, on the other hand, over routes in which the Western Pacific would be an intermediate participating carrier, was discriminatory and prejudicial, and that the combination rates between such points over such routes were unreasonable. Therein, division 2 said, at pages 136 and 137:

> In requesting the application of the joint rates over its line complainant is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic which, under the act, belongs, in the absence of emergency, to the Northwestern Pacific and Southern Pacific.

The instant complainant likewise is not here as a shipper or receiver of traffic but solely as a carrier seeking to participate in traffic on which the Union Pacific refuses to relinquish its long haul. In that proceeding, the distance over the Southern Pacific route to Ogden was about 200 miles shorter than the route sought, which is substantially the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves. Again, the short-hauling provision was held to be a bar to the relief sought.

Since the two decisions last above referred to, section 15 (4) has been amended (in 1940), so that now the prohibition against short hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the "through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation." Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In *Pennsylvania R. Co.* v. *United States*, 323 U. S. 588, which affirmed the judgment of a lower court sustaining an order of division 2 in *D. A. Stickell & Sons., Inc.*, v. *Alton R. Co.*, *supra*, the Supreme Court said that the expressions "more efficient or more economic" transportation, as used in section 15 (4), "may well embrace both shippers' and carriers' interests, * * * that both interests should be considered and a fair balance found." These latter considerations are not determinative, however, unless the existing routes can be found not to provide "adequate" transportation.

In the proceeding just mentioned, the Supreme Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests.

There is no contention here by complainant that the present routes of the defendants are not adequate for the traffic hauled, and no finding is sought by complainant to that effect. The absence of such a request may well be due to complainant's contention, not sustained herein except as to sheep and goats to points on the Missouri River and east thereof, that through routes via Ogden and the Rio Grande already exist within the meaning of section 15 (3) of the act. Testimony on behalf of shippers, however, does raise a question as to the need for more adequate and economic service than afforded by existing routes with respect to some commodities.

In order properly to evaluate the testimony of shippers it is necessary to consider the nature, extent, and functioning of our intricate and far-flung commodity marketing system. The growth of our population and the development of the country have required a constantly expanding flow of diverse commodities. Great consuming areas in many instances are far distant from the points of production of the necessities of every-day life, particularly articles of food. Movements of transcontinental proportions are involved in important instances. That is true here. A complex but efficient marketing

system has been evolved to provide as orderly a distribution of food commodities as possible. Adequate transportation facilities and services are required for the proper functioning of the system. Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and over as many routes as possible. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that as much flexibility as possible in the distribution process be permitted. A number of services, not only at origin and destination, but en route, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities. *Southeastern Vegetable Case*, 200 I. C. C. 273, and *Routing Lumber and Fruits, South to C. F. A. Territory*, 256 I. C. C. 223.

While the through service over defendants' routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande, via Ogden or Salt Lake City, this is not true with respect to the commodities we have enumerated. The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the widespread system developed for the marketing of such commodities. This conclusion is also supported and emphasized by the situation with respect to the operation of many of the in-transit privileges and services which are generally accorded such traffic and are necessary for its efficient marketing. For instance, on this traffic reconsigned or accorded transit privileges, such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply. On such traffic the defendants' routes are inadequate and less economical than are the Rio Grande routes.

In addition to the above-mentioned commodities, we are of the opinion that a special need for joint routes and joint rates on granite and marble monuments, in carloads, from origins in Georgia and Vermont to destinations in the excluded area, has been established.

The situation as to the commodities above named, as to which the defendants' routes are inadequate, is largely similar to that considered in *D. A. Stickell & Sons, Inc.*, v. *Alton R. Co.*, *supra*. There is one point of difference. There, the operating conditions, mile for mile, on the respective routes were substantially similar. Here, as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein. This fact was recog-

nized by the Commission in prior proceedings. See *Livestock, Western District Rates, supra*, and *W. H. Bintz Co.* v. *Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486. There is before us no data from which the exact differences in the costs over the Union Pacific routes and the Rio Grande routes can be determined. Several estimates were made by witnesses for both the Rio Grande and the defendants, but the estimates vary so widely and are so obviously incomplete as to be practically useless. The record is sufficiently complete, however, to enable us to make a rough approximation of the differences in the operating conditions and to appraise the weight which should be given to those differences, as well as to the differences in the distances over the respective routes, in determining the issues before us.

The differences in the distances between the Union Pacific routes through Wyoming, on the one hand, and the Rio Grande routes sought, on the other, using Boise, Idaho, as a representative point in the excluded territory, vary approximately from 95 miles or 11 percent to Denver, short-route distance 880 miles; 200 miles or 14 percent to Kansas City, 1,410 miles; 211 miles or 8 percent to New York, N. Y., 2,691 miles; 200 miles or 9 percent to Atlanta, Ga., 2,289 miles, to 33 or 35 miles, or 2 percent, to New Orleans, and to Fort Worth and other points in the Southwest, with short-route distances varying from 1,612 miles at Oklahoma City to 2,282 miles at New Orleans. From most of the excluded territory to western trunk-line destinations north of the route of the Union Pacific and Chicago & North Western between Omaha and Chicago, and in the Dakotas, the short routes are in connection with the Northern Pacific, Great Northern, or Milwaukee, and to such destinations the Rio Grande routes sought via Ogden are longer generally by at least 33 percent, and range up to more than 50 percent, than the short routes. From many points in the excluded territory to points in Colorado east of and including the common points, Kansas west of points on the Missouri River, and Nebraska, except Omaha, the short-route distances are less than 1,000 miles. We are of the view that the differences in transportation conditions, by which is meant operating conditions and lengths of hauls, over the Union Pacific routes and over the Rio Grande routes via the Ogden gateway are substantial for hauls between the excluded territory, on the one hand, and points in Colorado east of and including the common points, Kansas west of points on the Missouri River, Nebraska, except Omaha, the Dakotas, Minnesota, Wisconsin, and Iowa and Illinois north of points on the route of the Union Pacific and the Chicago & North Western extending between Omaha and Chicago, on the other hand, but that for hauls between points in the excluded territory and points in the United

States east and south of the points and territory above described, the differences in the transportation conditions are, in general, spread over hauls of such great lengths that, considered as a whole, they become relatively insignificant. Thus, over these respective routes from and to the latter points the transportation conditions are substantially similar.

As pointed out, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments westbound, and ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs east-bound, who reconsign such shipments or take advantage of transit arrangements at intermediate points on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific routes, and constitutes adequate support for a finding of undue prejudice and preference under section 3 (1) of the act.

As before indicated, on a number of commodities, from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates, the same as those in effect over the routes of the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections here defendant, its long haul, while refusing to apply the same joint rates over routes in connection with the Rio Grande via the Ogden gateway. Such routes by which the Union Pacific and certain of its connections short haul themselves are generally about as long as, and in many instances substantially longer than, the Rio Grande routes here sought, and the hauls of the Union Pacific, as well as of certain of the other defendants, are shorter over such established routes than over routes in connection with the Rio Grande via Ogden.

There is upon this record, however, no substantial evidence as to the transportation conditions over the established routes referred to. A finding of discrimination under section 3 (4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than the over routes said to be preferred. No such a showing has here been made.

The situation is different with respect to traffic between Utah common points, on the one hand, and the northwest area, on the other. On such traffic the Union Pacific interchanges with the Bamberger Railroad Company at Ogden at joint through rates to and from

points on that line, including Salt Lake City. There is no apparent reason why similar arrangements should not apply on like traffic interchanged with the Rio Grande. The Bamberger operates, for about 36 miles, between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande.

The evidence is convincing that the joint rates sought, which now apply over the Union Pacific routes, would be reasonable for application also over the Rio Grande routes via the Ogden gateway on the traffic, and from and to the points, embraced within the findings of unlawfulness herein made.

The testimony dealing with the terminal facilities at Ogden has been carefully considered. We are persuaded that the additional traffic over the Rio Grande routes which will result under the findings herein made can be interchanged at that point or at Salt Lake City by the use of the present facilities and without serious detriment to the operating efficiency of the railroads concerned.

CONCLUSIONS

We conclude:

1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas.

2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and

unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act.

4. That except as indicated in the preceding findings, the allegations made in the complaint are not sustained.

An appropriate order will be entered.

LEE, *Commissioner*, concurring in part:

I concur in the conclusions of the majority that joint rates the same as apply over the Union Pacific and its connecting lines should be established via Ogden or Salt Lake City, in connection with the Rio Grande, on the commodities and from and to the origins and destinations specified by the majority; that the rates assailed on such commodities from and to such origins and destinations are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes; and that the maintenance by the Union Pacific and other defendants of joint rates from and to points on the Bamberger Railroad south of Ogden, while refusing to participate in like rates from and to the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3 (4) of the act. The decision in this case will correct in part, a long-standing, unlawful rate adjustment, an adjustment which has discriminated against the industries and people of Washington, Oregon, Idaho, Montana, and Utah, the area from and to which such unlawful adjustment applies being referred to in the report as the "excluded territory." However, I am of the opinion that the action of the Commission should not be limited to a partial correction of this unlawful rate adjustment. On the facts shown in the record, the act requires that the rates on all commodities, between points in the excluded territory and Colorado common points and points east thereof, over the Rio Grande routes shall be no higher than those over the Union Pacific routes. The act contemplates that there shall be no excluded territory with respect to any commodity or persons.

Transcontinental joint rates on freight traffic were established in 1897, from and to the territory here considered, applicable over the Rio Grande routes via Ogden. These joint rates were in effect for many years, until 1906 from and to some points and until 1912 from and to other points, when they were canceled by the Union Pacific and higher combination rates became effective. However, the through routes were not closed. Numerous shippers testified that these routes are open and available and that they can route traffic over them. This testimony was not challenged or contradicted. On the contrary, a responsible traffic official of the Union Pacific testified that the Rio Grande routes are "actually available today on traffic to or from points on the Union Pacific and its connections in Utah north of Ogden, Idaho, Montana, Oregon, and Washington." That these routes are open and used is proved by evidence in the record (1) of east-bound shipments of various commodities made in 1948 from points on the Union Pacific in the excluded territory to Colorado common points, and which moved over the Rio Grande routes, including the entire length of the Rio Grande line, on through bills of lading issued by the Union Pacific, (2) of west-bound shipments of various commodities made in the same year from various eastern points to points in the so-called excluded territory, and which moved on through bills of lading over carriers east of Colorado junctions to the Rio Grande at such junctions and thence over the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond, and (3) of numerous shipments moved over the Rio Grande routes between eastern points and the excluded territory during World War II and in 1949 when the Union Pacific main line in Wyoming was blocked by snow. The year 1948, the calendar year immediately preceding the hearing, was selected as typical of the situation which prevailed in the prior years and which continued up to the time of the hearing.

I am unable to agree with the majority that the shipments referred to above must be regarded as of an isolated nature and as falling in the same category as the single shipment considered in the *Beaman Elevator case*, 155 I. C. C. 313, referred to in a footnote to the opinion of the United States Supreme Court in *Thompson* v. *United States*, 343 U. S. 549. In the *Beaman* case a single carload shipment of grain moved over the lines of two connecting railroads from Beaman, Iowa, via Clinton, Iowa, to St. Louis, Mo. The evidence plainly showed that the bill of lading covering this shipment was issued and recognized by these railroads through error. There was no evidence "of any like movement before or since." Adequate service was available over nine other routes. A wholly different situation is before us in this proceeding. Numerous shipments of a variety of commodi-

ties have been transported in both directions over the Rio Grande routes on through bills of lading deliberately issued and recognized by the Union Pacific and the other participating carriers. The situation here before us is similar to that considered by the Supreme Court in *Virginia Ry.* v. *United States*, 272 U. S. 658, also referred to in a footnote to the decision in *Thompson* v. *United States*, *supra*, in which, in referring to the route over which the Commission there prescribed reasonable and nondiscriminatory rates, the Court stated that "that route is closed commercially, because these two carriers have not established any joint rates to the West from any of these 54 mines; and the combination of the Virginian's local rate from the mines to the junction with the Chesapeake & Ohio's rates from the junction to the West, results in charges so high as to be prohibitive." The Court held however, that even though the route was closed commercially, open through routes to the West were in existence.

In the *Thompson* case the court pointed out that "there is no evidence that any shipment has ever been made from Lenora to Omaha via the Burlington line" or that the carriers have ever offered through service over the Missouri Pacific-Burlington route. Thus, the facts before the Court in that case likewise were wholly different from those before us in this proceeding. I think that the Court's opinion in that case supports the conclusion that through routes on freight traffic over the Rio Grande routes have existed for many years and now exist and that the short-hauling provision of section 15 (4) is not applicable.

If, however, the Rio Grande routes were actually closed, the short-hauling provision of section 15 (4) of the act would not be a bar to the correction in full of the present discriminatory rate adjustment. The discrimination in violation of section 3 of the act, shown by the evidence, makes that provision of section 15 (4) inapplicable. In any event, the Rio Grande routes are shown to be needed in order to provide adequate, and more efficient and more economic transportation, and, if they were not already open through routes, we could and should require that they be opened.

As stated in the report of the majority, the evidence shows a substantial disadvantage or handicap on the part of shippers or receivers of monuments, livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, who reconsign shipments or take advantage of transit arrangements at intermediate points on the Rio Grande, as compared with the lower rates, together with similar reconsignment and transit privileges, enjoyed by their competitors located on the Union Pacific. The evidence is equally impressive with respect to the disadvantage or handicap to shippers

or receivers of lumber, building materials, farm machinery, and other commodities. For instance, the lumber company at Military Junction, Colo., referred to in the majority report, is handicapped in its efforts to compete with mills at Denver and Kansas City because it cannot obtain lumber from the excluded territory for milling in transit on the same basis as these competing mills. A representative of that company testified that it would purchase several million feet of lumber annually from points in the excluded territory if it had available reasonable and nonprejudicial joint rates over the Rio Grande routes. By reason of the rate situation complained of, the lumber dealer at Grand Junction, Colo., who is also referred to in the majority report, has lost business to competitors who have the benefit of transit at the joint rates applicable over the Union Pacific routes. This evidence is only typical; it was presented as representative of the prevailing situation.

Shippers and receivers of freight at points in eastern Oregon and southern Idaho, on the line of the Union Pacific, have been, and are, excluded from additional markets that would be available to them if reasonable and nonprejudicial joint rates were in effect over the Rio Grande routes. Some of these shippers express the belief that the establishment of such joint rates would provide them with a better car supply, in that the Rio Grande would furnish additional cars to move out shipments routed over its line. It is common knowledge that a better supply of cars is available to shippers who have competitive routes to the consuming markets. The record clearly establishes that the present rate adjustment results in a substantial disadvantage to the industries, shippers, and receivers located in the considered territory, and in undue prejudice to them.

Likewise, the evidence establishes that the defendant railroads discriminate against the Rio Grande, in that from and to points in northern Idaho and in Oregon and Washington to and from points in southwestern, southern, and official territories, the defendants, particularly the Union Pacific, short haul themselves by maintaining joint rates, the same as those in effect over the routes of the Union Pacific and its connections through Wyoming, over routes which fail to give to the Union Pacific, or one or more of its connections, its long haul, while refusing to establish the same joint rates over the Rio Grande routes. The routes by which defendants short haul themselves are generally as long as, and in many instances substantially longer than, the Rio Grande routes, and the hauls of the Union Pacific and of other defendants are shorter over such established routes than over the Rio Grande. The evidence does not establish that transportation conditions are more favorable over these routes

than over the Rio Grande routes which are discriminated against by defendants. On the contrary, the record, in my opinion, warrants finding that the transportation conditions over such routes are, in general, no more favorable than over the Rio Grande routes. The Union Pacific and the other defendants are, and for the future will be, violating section 3 (4) of the act by failing and refusing to participate in joint rates with the Rio Grande, from and to points in the excluded territory, to and from points in official, southern, and southwestern territories, while participating with each other in joint rates from and to the same points, over routes over which the Union Pacific and other defendants short haul themselves.

The Union Pacific is a strong and progressive railroad. It is ably managed and efficiently and economically operated. Being the only railroad in southern Idaho, every shipper in that area is dependent on it for rail service. I am persuaded that, instead of being allowed to continue to maintain an "excluded territory," it should be required to provide these shippers with joint rates which will enable them to buy and sell in all markets on an equality with other shippers, and that such joint rates will not result in any substantial diversion of the traffic now moved over its lines.

The joint rates now in effect on freight traffic over the Union Pacific routes are shown by the record to be reasonable for application over the Rio Grande routes. We should require that these rates be maintained over the latter routes.

PATTERSON, *Commissioner*, concurring in part:

I concur in the relief granted to the Rio Grande and transit operators thereon who are handicapped by the lack of through routes and joint rates the same as those over the Union Pacific routes. It seems to me, however, that the findings of unlawfulness are inconsistent in that they fail to include lumber and articles taking lumber rates in the relief granted.

The showing made of a need for such through routes and joint rates, in my opinion, is more persuasive as to lumber and articles taking lumber rates than as to any of the commodities included in the foregoing findings, with the possible exception of livestock. The record shows that at least one lumber dealer at Grand Junction, another at Military Junction, near Denver, and a wood-treatment plant at Salida, all on the Rio Grande, are handicapped in their efforts to compete with like dealers on the Union Pacific routes, and that at least the dealer at Grand Junction has lost business, by reason of the rate situation complained of, to competitors who have the benefit of transit at the joint rates over the Union Pacific routes. I

believe this evidence is adequate support for the inclusion of this commodity group in the findings of unlawfulness made.

The order entered in connection with this report requires the establishment on particular commodities, in connection with the Rio Grande, of through routes and joint rates the same as those now in effect over the Union Pacific routes. The formation of those through routes is appropriately left, in large measure, to the carriers. I want to make it clear that in my view, on traffic to or from the area east of the Colorado common points, where the provisions of the order so permit, these new routes should be formed in such a manner as to short haul the Union Pacific only to the extent necessary to afford the Rio Grande its line haul and avoid unduly circuitous routes.

ARPAIA, *Commissioner*, concurring:

In my opinion there are through routes over the Rio Grande and the Union Pacific via the Ogden Gateway on traffic between the territories included in this proceeding, and therefore a finding under the provisions of section 15 (4) of the Interstate Commerce Act is not required.

The evidence of record shows that these routes presently are open and available to shippers on combination rates. The history of the relationship between these carriers leaves no doubt as to that fact.

When joint rates over these routes, which were in effect from 1897 to 1906 and 1912, were canceled by the Union Pacific, no specific cancellation was made of the through routes over which the joint rates applied. To my mind it would be necessary for the Union Pacific to have shown affirmatively that it refused traffic on through billing over the Ogden Gateway in order to negative the existence of such through routes. Instead, the record shows information elicited from an official of the Union Pacific to the effect that routes via Ogden were available subject to the application of combinations of local rates.

The question then is to what extent should we compel joint rates. Joint rates over the routes through Ogden, I believe, are warranted in the public interest only on the commodities for which relief is included in the majority report.

We should interfere in the management of a railroad only when the reasons for doing so are clear and compelling, as they are here, and only to the extent the public interest actually requires.

MAHAFFIE, *Commissioner*, dissenting in part:

I dissent from the majority report insofar as it fails to find that the existing routes to and from the northwest territory, described in

the report, via the Rio Grande through the Ogden gateway are effective through routes and that the failure of the Union Pacific and other defendant railroads to establish joint rates with the Rio Grande via Ogden unjustly discriminates against that carrier. I disagree also because the report does not find that it is necessary and desirable in the public interest that joint rates on commodities generally, in addition to those specified, should be established over such through routes.

We are not called upon in this proceeding to exercise our authority, under section 15 (4) of the Interstate Commerce Act, to establish new through routes via that gateway. Therefore, the conditions in that paragraph are not applicable. We are free to exercise our power under section 15 (3) to establish joint rates unhampered by those restrictions.

A finding that these routes are open and freely available to shippers today is fully supported by the evidence. It was acknowledged by a freight traffic official of the Union Pacific that a shipper has the right under the act (section 15 (8)), to specify such routes for the carriage of his shipments. That right, it should be noted, can be availed of only when two or more through routes and through rates are actually established and in existence.

The record shows that some joint through rates, as distinguished from combination rates, are in fact now published in a Union Pacific tariff for application through Ogden over the entire length of the Rio Grande to Denver and the Union Pacific beyond. These apply on shipments of sheep or goats originating on the Union Pacific in southern Idaho and eastern Oregon, billed to destinations on the Missouri and Mississippi Rivers and to Chicago and other points. The joint rates are higher than rates on like livestock moved over the direct route of the Union Pacific and, therefore, retard use of the Rio Grande route. But the publication of such joint rates in connection with transportation over the whole length of the Rio Grande is proof of the consent of the Union Pacific for the use of that rail line as part of a through route at joint rates. And it was further stated by the same witness that the Union Pacific has no objection to publishing the same joint rate arrangement on shipments of cattle.

In 1941–42 mixed military trains with troops in passenger cars and military supplies in freight service were transported over this route on through billing. Four examples of such trains are described in the record. These moved from Fort Sill, Okla., and Camp Claiborne, La., to Fort Lewis, Wash., in December 1941 and February 1942. The trains were routed and moved to Colorado junctions of the Rio Grande, thence over that railroad to Ogden and the Union Pacific

beyond. Unlike certain other movements to and from the northwest area via Ogden in the war period in connection with these two lines, the military trains were not routed under service orders issued by us or the Office of Defense Transportation. Arrangements for the through movements were made with the railroads and the rates charged were settled on the basis of the joint rates applicable in connection with the Union Pacific routes through Wyoming.

The existence of the route as an established through route was undoubtedly an important consideration for its use in February 1949, when the line of the Union Pacific was blocked by snow. In that emergency, freight cars, passenger cars, express and mail were promptly diverted by the Union Pacific through Denver over the Rio Grande to Salt Lake City and to Ogden for movement beyond. Of the freight cars diverted, 1,493 were for destinations in Idaho on the Union Pacific and in the northwest area.

Actual and continuous use of the Rio Grande route at through rates made by combinations of separate rate factors via Ogden to and from the Northwest without opposition or objection by the Union Pacific or other participating railroads is amply shown by the evidence of typical movements of numerous commodities. The calendar year 1948 was used by the Rio Grande as a representative year. In that year 16 carloads of various commodities were shipped from the northwest territory over the Union Pacific to Ogden and the Rio Grande beyond to Denver, Louviers, Pueblo and Trinidad, Colo., over the entire length of the Rio Grande. They originated on the Union Pacific and moved on through bills of lading. Some of the cars were partly unloaded at Rio Grande points and then continued through to their destinations. Seventeen carloads of various commodities moved, from late in December 1947, and in the year 1948, from various eastern points on through bills of lading at through combinations of rates over rail lines east of the Colorado junctions to the Rio Grande at such junctions thence over that line to Salt Lake City or Ogden and the Union Pacific beyond. Some of the cars were stopped for partial unloading at stations on the Rio Grande or the Union Pacific.

The same kinds of movements as those exhibited in 1948 prevailed to about the same extent in years prior to 1948 and continued into 1949 at the time of the hearings.

All of this evidence clearly supports a finding that the routes are existing established through routes over which through rates apply and that the railroads participating therein consent to their use as through routes and freely hold themselves out to shippers as ready and willing to perform transportation service over them. They meet completely the requirements necessary as prerequisites for a finding that

they are established through routes announced by the United States Supreme Court in *Thompson* v. *United States*, 343 U. S. 549. In that case, the Court said "the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." However, as stated by the Court, there was no evidence that any through transportation had ever been offered from and to the points involved in the suit and, therefore, no through routes existed between those points.

The situation here is in striking contrast to that in the *Thompson* case. Here there is substantial evidence of a holding out that through transportation will be furnished and of execution of such offers by the issuance of through bills of lading and the performance of through service over many years. We cannot ignore the fact that the joint rates over these routes that were in effect from 1897 to 1906 and 1912 were canceled by the Union Pacific without canceling its participation in the same through routes thereafter at higher through combination rates. That railroad's course of conduct evidenced no more than a desire to discontinue joint rates so as to make the higher combinations applicable. Its action in canceling its participation in joint rates did not, without more, cancel its participation as a carrier in the through routes. The latter were never disestablished but continued to exist. The record taken as a whole inevitably leads to that conclusion. To find under such a state of facts that no through routes exist for commodities generally is directly contrary to the evidence.

Even if a finding that no through routes exist over this line be sustained, there is substantial evidence that the rate situation results in undue prejudice and undue disadvantage to shippers and to districts and localities in Utah and Colorado dependent upon the Rio Grande for rail service, in violation of section 3 (1) of the act. Such violation removes the restrictions imposed in section 15 (4) upon our authority to establish through routes. That undue prejudice and undue disadvantage exist is fully supported by the testimony of numerous witnesses. Briefly, the testimony shows that livestock producers in Utah and Colorado, in areas served by the Rio Grande, are not able, due to the combination through rates via Ogden, to buy on a reasonably competitive basis, cattle and sheep in Idaho, Montana, Oregon, and Washington for grazing and feeding in transit on the ranges in Utah and Colorado, in competition with buyers and stock feeders in northern Colorado, Nebraska, and northern Kansas. The same undue prejudice and undue disadvantage is experienced by buyers and feeders in southeastern Colorado east of Pueblo, Colo., and

in southwestern Kansas served by the Santa Fe and the Missouri Pacific railroads. Their failure to obtain joint through rates from the producing areas in the Northwest over the Union Pacific to Ogden, Rio Grande to Pueblo and its connections beyond places them at an undue disadvantage.

The record contains convincing evidence by representatives of large groups of shippers that there is undue prejudice and undue disadvantage to wool producers, as well as to livestock operators in Colorado served by the Rio Grande; also to lumber dealers and processors; dealers in farm machinery and other commodities, and to a cold storage warehouse operator in Pueblo. There is substantial evidence from producers and shippers of agricultural commodities in the Northwest, particularly in Idaho, to support findings that the refusal of the defendant railroads to join in joint through rates via Ogden and the Rio Grande to and from points beyond the Colorado gateways of that carrier exclude them from additional markets needed for their products. All of that evidence sustains and fully supports the finding that there is a violation of section 3 (1) of the act and justifies a general finding that joint through rates via the Ogden gateway should be established on commodities generally. The findings should not be limited, as are the findings of the majority, to particular commodities as to which evidence was offered but should be broadened to include all commodities.

We are fully warranted in dealing with this situation broadly, in considering what is necessary and desirable in the public interest, with respect to joint rates over these established through routes. We are not limited to consideration of proof as to every rate on every commodity from every origin to every destination. Such a view of our authority is too narrow and is not justified by the law or the evidence.

In other types of proceedings where we found it necessary to deal generally with a comprehensive rate situation, the Supreme Court has held that we may properly make general findings upon typical evidence representative of the situation as a whole.

In exercising authority under section 13 (4) as to the lawfulness of rail rates on intrastate traffic in a State and under section 15 (6) as to divisions of joint rates of rail carriers we may make general findings when the evidence is shown in numerous and representative instances that are typical of the rate situation as a whole. Similarly we need not attempt the impracticable, if not impossible, task of examining every rate on every commodity and class of commodities, from every origin to every destination in the large areas and territories under scrutiny here. We can adjust the remedy to the evil and make our order as broad as the discrimination and undue prejudice. See *Illinois*

Central R. Co. v. *Public Utilities Commission*, 245 U. S. 493, 507. In *Wisconsin Railroad Comm.* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 579, a proceeding dealing with intrastate rates on a State-wide basis, the Court stated that "any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute." In *Georgia Public Service Comm.* v. *United States*, 283 U. S. 765, 774, the Court said that "when an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings." That case also arose under section 13 (4) of the act with respect to intrastate rates. There the order related to a few commodities but the rates prescribed were State-wide in operation and applied to shipments between hundreds of points of origin and destination. Under those circumstances the Court held that "To require specific evidence and separate adjudication in respect of each would be tantamount to denying the possibility of granting relief."

To the same effect is the holding of the Court in *New England Divisions Case*, 261 U. S. 184, 197. There the Court had under consideration contentions with respect to the nature of the evidence in support of our order as to divisions of joint rates between groups of rail carriers. The Court pointed out that our order was based on evidence which we assumed was "typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier." That method of proof was found to be our common practice in adjudicating comprehensively upon substantially all rates in a large territory, and that the actual necessities of procedure and administration had led to the adoption of that method also in passing upon the reasonableness of proposed rate increases. That method was found equally appropriate in passing upon multitudes of divisions of joint rates. That it has similar application in a comprehensive case such as we have here where we are called upon to establish joint rates via a gateway through which substantially all joint rates have been refused, is equally clear. In the case cited, the Court said that there was no constitutional obstacle to the adoption of the method pursued and that only in the way could the task be performed.

The same rule should be applied in the instant case, in order to carry out effectievly our authority to prescribe, in the public interest, joint rates by way of the Ogden gateway. The report of the majority finds it necessary in the public interest that joint rates via that gateway be established on particular commodities as specified in the report. The same evidence is, and should be concluded to be typical of the rate situation as a whole. In accordance with our practice in other types of comprehensive proceedings which has been found lawful and neces-

sary under principles announced in the Supreme Court cases cited, that evidence should be found adequate to support an order that joint rates be established via that gateway on commodities generally.

I am authorized to state that COMMISSIONERS SPLAWN and CROSS join in this expression.

COMMISSIONER KNUDSON did no participate in the disposition of this proceeding.

APPENDIX

From—	To—	Commodity	Rates[1]		Distances[2]		Revenues per car-mile			Average carload weight
			Via Union Pacific routes	Via D&RGW routes	Via Union Pacific routes	Via D&RGW routes	Via Union Pacific joint rates	Via D&RGW combination rates	Via D&RGW joint rates[3]	
			Cents	*Cents*	*Miles*	*Miles*	*Cents*	*Cents*	*Cents*	*Pounds*
Pendleton, Oreg	North Salt Lake, Utah	Cattle	58	90	342	342	37.99	58.95	37.99	22,400
Logan, Utah	Denver, Colo	do	83	111	649	679	28.65	36.62	27.38	22,400
Huntington, Oreg	Chicago, Ill	do	168	213	1,872	2,083	20.10	22.91	18.07	22,400
Idaho Falls, Idaho	Oklahoma City, Okla	Potatoes	90	128	1,428	1,462	28.44	39.50	27.78	45,120
Redmond, Oreg	Atlanta, Ga	do	183	203	2,808	3,008	26.19	30.45	24.45	45,120
Armstead, Mont	Oklahoma City, Okla	Dry beans and peas	93	203	1,550	1,584	50.89	108.70	49.80	84,820
Twin Falls, Idaho	Atlanta, Ga	do	148	187	2,172	2,372	57.80	66.87	52.92	84,820
Nampa, Idaho	Detroit, Mich	Lettuce	175	217	2,074	2,286	20.96	23.58	19.02	24,840
Hood River, Oreg	Pittsburgh, Pa	Apples	192	252	2,666	2,877	29.99	36.47	27.79	41,640
Spokane, Wash	Kansas City, Mo	Wheat	86.5	132	1,901	2,101	47.40	65.45	42.89	104,180
Pocatello, Idaho	Wichita, Kans	do	68.5	96	1,206	1,240	59.17	80.66	57.55	104,180
Spokane, Wash	Omaha, Nebr	Lumber	92	143.5	1,784	2,003	35.76	49.68	31.85	69,340
Kellogg-Wardner, Idaho	Fort Worth, Tex	do	104	143.5	2,237	2,271	32.24	43.81	31.75	69,340
Portland, Oreg	Provo, Utah	Canned goods	84	116	943	930	53.82	75.36	54.57	60,420
Do	New Orleans, La	do	143	209	2,762	2,728	31.28	46.29	31.67	60,420
St. Louis, Mo	Logan, Utah	Roofing	153	196	1,433	1,588	64.76	75.91	59.25	61,500
Chicago, Ill	Spokane, Wash	do	161	250	2,272	2,483	43.58	61.92	39.88	61,500
Geneva, Utah	Boise, Idaho	Iron and steel articles	63	78.55	447	440	109.76	139.03	111.51	77,880
Do	Portland, Oreg	do	63	78.55	928	921	52.87	66.42	53.27	77,880
Pittsburgh, Pa	do	do	167	205	2,729	2,941	47.50	54.10	44.08	77,880
Salt Lake City, Utah	Butte, Mont	Agricultural implements	141	173	433	434	98.67	120.78	98.44	30,300
Detroit, Mich	Malad, Idaho	do	295	333	1,836	1,982	49.17	51.41	45.54	30,300
Denver, Colo	Spokane, Wash	Vehicle parts	251	370	1,371	1,466	79.16	109.13	74.03	43,240
Fort Worth, Tex	Seattle, Wash	Animal and poultry feed	119	278	2,338	2,372	31.48	72.48	31.02	61,840
Denver, Colo	Butte, Mont	Tires and tubes	179	294	908	1,004	73.41	109.05	66.39	37,240
Atlanta, Ga	do	Furniture	396	596	2,318	2,518	28.63	39.67	26.36	16,760
Kansas City, Mo	Seattle, Wash	Paper	154	373	2,069	2,269	31.72	70.06	28.93	42,630
Oklahoma City, Okla	Boise, Idaho	Petroleum and petroleum products.	141	188	1,612	1,645	48.09	62.83	47.13	54,980
Kanssa City, Mo	Portland, Oreg	Paint and paint material	170	364	1,891	2,091	52.84	102.32	47.79	58,780

[1] In cents per 100 pounds; in effect September 1, 1949.
[2] Over existing routes of Union Pacific and connections; and over Denver & Rio Grande Western routes.
[3] At joint rates applicable over competitive routes of Union Pacific and connections.

[fol. 24] APPENDIX "C" TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission Held at Its Office in Washington, D. C., on the 10th Day of June, A. D. 1953

No. 30297

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

v.

UNION PACIFIC RAILROAD COMPANY, et al.

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of petitions for reconsideration, and for modification of the findings and order filed by complainant, defendants and various interveners, and the several replies to the petitions, and it appearing that none of the petitions presents matters that are materially different from those of record in the proceeding, or offers new or additional contentions or arguments that vary substantially from those previously advanced and considered by the Commission in disposing of the issues:

It is ordered. That said petitions be, and they are hereby, denied.

By the Commission.

George W. Laird, Acting Secretary. (Seal.)

[fol. 25] [File endorsement omitted]

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA

[Title omitted]

SUMMONS AND RETURNS—Filed July 2, 1953

Defendants

To the above named Defendants:

You are hereby summoned and required to serve upon Elmer B. Collins, and W. R. Rouse, plaintiff's attorneys,

whose address is: 1416 Dodge Street, Omaha 2, Nebraska, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Mary A. Mullen, Clerk of Court, by Evelyn Copeland, Deputy Clerk. (Seal of Court.)

Date: June 26, 1953.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure. LMP.

[fol. 25a] Return

I hereby certify and return that I received this Summons on the 26th day of June, 1953 and on the 26th day of June, 1953 I served the same upon the within named United States of America and the Interstate Commerce Commission by leaving a true and correct copy thereof with Joseph T. Votava, United States District Attorney for the District of Nebraska, at Omaha, Douglas County, State and District of Nebraska and by mailing two true and correct copies thereof to the Honorable Herbert Brownell, Jr., Attorney General of the United States at Washington, D. C. in a duly registered envelope, a receipt for same is herewith attached and made a part of this return and by mailing a true and correct copy thereof to George W. Laird, Acting Secretary of the Interstate Commerce Commission at Washington, D. C. in a duly registered envelope a receipt for same is also attached and made a part of this return. And at the same times and places and in the same manner and upon the same parties I also served copies of the Complaint herein.

(S.) Frank Golden, U. S. Marshal, District of Nebraska.

(Here follows 4 photolithographs, side folios 25b, 25c, 25d, 25e)

Post Office Department
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300
(GPO)

Washington, D.C. 28
June 29, 1953
11:00 P.M.

POSTMARK OF DELIVERING OFFICE

Return to United States Marshall
(NAME OF SENDER)

Street and Number, or Post Office Box,

REGISTERED ARTICLE

NO. 77136

INSURED PARCEL

NO.

OMAHA,
NEBRASKA.

16—12421-1 16—12421-1 25b

881

Form 3811
Rev. 1-52

RETURN RECEIPT

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1 Hon. Herbert Brownell
(Signature or name of addressee)

2 Geo. H. Virts
(Signature of addressee's agent—Agent should enter addressee's name on line ONE above)

Date of delivery 6 - 29 -, 19 53

U. S. GOVERNMENT PRINTING OFFICE 16—12431-2

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Post Office Department
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PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300
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POSTMARK OF DELIVERING OFFICE

Return to United States Marshall
(NAME OF SENDER)

Street and Number, or Post Office Box,

REGISTERED ARTICLE

No. 77137

INSURED PARCEL

No.

OMAHA,

NEBRASKA.

16—12421-1 16—12421-1 25d

881

Form 3811
Rev. 1-52

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this Card.

1 Interstate Commerce Commission
(Signature or name of addressee)

2 D. J. O'Connor
(Signature of addressee's agent—Agent should enter addressee's name on line ONE above)

Date of delivery Jun 29, 1953

U. S. GOVERNMENT PRINTING OFFICE 16—12421-2

25e

[fol. 26] [File endorsement omitted]

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ORGANIZING THREE-JUDGE COURT—July 2, 1953

The above named plaintiffs having filed suit which is now pending in the above entitled court, seeking temporary and permanent injunction enjoining, suspending, annulling and setting aside a certain order of the Interstate Commerce Commission dated January 12, 1953, on the grounds, among others, that said order is and the enforcement thereof will be violative of certain provisions of the Constitution of the United States; and said application for temporary injunction having been presented to the Honorable John W. Delehant, United States District Judge for the District of Nebraska, and said Judge having notified the Chief Judge of the United States Court of Appeals for the Eighth Circuit thereof;

It Is Now Here Ordered that Honorable Joseph W. Woodrough, United States Circuit Judge, and Honorable Harvey M. Johnsen, United States Circuit Judge, be and they [fol. 27] hereby are designated to with *with* the above named Honorable John W. Delehant, United States District Judge for the District of Nebraska, to hear and determine said action and proceeding.

Dated this 2nd day of July, A. D. 1953.

Archibald K. Gardner, Chief Judge, United States Court of Appeals, for the Eighth Circuit.

[fol. 28] CLERK'S CERTIFICATE OF SERVICE OF ORDER ORGANIZING THREE-JUDGE COURT (omitted in printing).

[fol. 29] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ORGANIZING THREE-JUDGE COURT—July 13, 1953

The above named plaintiffs having filed suit which is now pending in the above entitled court, seeking temporary and permanent injunction enjoining, suspending, annulling and setting aside a certain order of the Interstate Commerce Commission dated January 12, 1953, on the grounds, among others, that said order is and the enforcement thereof will be violative of certain provisions of the Constitution of the United States; and said application for temporary injunction having been presented to the Honorable John W. Delehant, United States District Judge for the District of Nebraska, and said Judge having notified the Chief Judge of the United States Court of Appeals for the Eighth Circuit thereof;

It Is Now Here Ordered that Honorable John B. Sanborn, United States Circuit Judge, and Honorable Harvey M. Johnsen, United States Circuit Judge, be and they hereby [fol. 30] are designated to sit with the above named Honorable John W. Delehant, United States District Judge for the District of Nebraska, to hear and determine said action and proceeding.

The order organizing a three-judge court, dated herein July 2, 1953, is hereby revoked and cancelled for the reason that the Honorable Joseph W. Woodrough, United States Circuit Judge, deems himself disqualified to sit in said action.

Dated this 13th day of July, A. D. 1953.

Archibald K. Gardner, Chief Judge, United States Court of Appeals, for the Eighth Circuit.

[fol. 31] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed July 17, 1953

The Interstate Commerce Commission, one of the defendants in the above-entitled case, hereinafter called the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the complaint contained, for answer thereunto or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering the allegations of paragraphs I to III, inclusive, of the complaint, the Commission admits the same.

II

Answering the allegations of paragraph IV of the complaint, the Commission admits the same but refers to the complaint filed August 1, 1949, referred to in said paragraph, for a more full and complete statement as to the relief sought by said complaint.

[fol. 32] III

Answering the allegations of paragraph V of the complaint, the Commission admits the allegations contained in the first sentence of said paragraph. In answer to the remaining allegations of said paragraph V of the complaint, the Commission refers the Court to the complaint in the Commission proceedings, which is a part of the record before the Court, for a statement as to the exact allegations contained therein.

IV

Answering the allegations of paragraph VI of the complaint, the Commission admits the same and avers that the

American Short Line Railroad Association also intervened in support of the Rio Grande's complaint.

V

Answering the allegations of paragraph VII of the complaint, the Commission admits the same, except that it alleges that The Denver and Rio Grande Western Railroad Company, as well as the Union Pacific Railroad Company, has numerous branch lines connecting with and extending from its main lines in Utah and Colorado.

VI

Answering the allegations of paragraph VIII of the complaint, the Commission admits the first four sentences thereof; the Commission neither admits nor denies the remaining allegations of paragraph VIII because they are argumentative in character and require no further answer. The Commission denies that diversion of the traffic to the Rio Grande would short-haul or deprive the Union Pacific of its present haul to the extent of about 1,000 miles and would deprive other railroad plaintiffs herein of their entire haul on many thousand carloads of traffic annually.

[fol. 33]

VII

Answering the allegations of the first sentence of paragraph IX of the complaint, the Commission admits that the joint rates were cancelled, but not with the approval of the Commission, and alleges that the through routes referred to in said paragrah IX were not cancelled as alleged in this paragraph of the complaint. The Commission denies the allegations contained in the last sentence of said paragraph IX.

VIII

Answering the allegations of paragraph X of the complaint, the Commission denies the same and alleges that said allegations are not material to any of the issues that were before it, or to any of the issues before this Court.

IX

Answering the allegations of paragraphs XI, XII, and XIII of the complaint, the Commission admits the same but respectfully refers the Court to its report of January 12, 1953, annexed to the bill of complaint as Appendix B, for a more full and complete statement as to its conclusions and findings, and the reason therefor, that is contained in the excerpt quoted in paragraph XII of the complaint.

X

Answering the allegations of paragraph XV of the complaint, the Commission denies that its order is invalid for any of the reasons set forth in said paragraph or for any other reason or reasons.

XI

Answering the allegations of paragraph XI the complaint, the Commission denies that its said order of January 12, 1953, if permitted to become effective would irreparably injure and damage plaintiffs.

[fol. 34]

XII

The Commission admits and alleges that in the proceedings in Docket No. 30297, *The Denver and Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.*, 287 I. C. C. 611, involved in this suit, the parties thereto, including the plaintiffs herein, were, and that each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearings a large volume of testimony and other evidence bearing upon the matters covered in said report and order of January 12, 1953, were submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of plaintiffs herein by their counsel; that at said hearings and subsequently, in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiffs in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceedings, including

the plaintiffs herein, its said order and report of January 12, 1953, annexed to and made parts of the complaint as Appendices A and B; that said report and order included the Commission's findings of fact, conclusions and requirements in the premises, and that, upon the evidence as aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions upon which its said report and order were based.

The Commission further alleges that the findings and conclusions of said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid.

[fol. 35] The Commission further alleges that in making said report, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the complaint herein.

The Commission further alleges that said report and order of January 12, 1953, were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said report and order the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the complaint. The Commission denies that its said report and order are unreasonable, arbitrary, unlawful, or null and void for any of the reasons set forth in said complaint, or for any other reason or reasons. The Commission denies that its said report and order cause, or will cause, plaintiffs either irreparable damage or any damage if said report and order are not enjoined.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint, insofar as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said order and report referred to and made parts of the complaint as Appendices A and B.

All of which matters and things the Commission is ready

to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, by Edward M. Reidy, Chief Counsel.

Samuel R. Howell, Assistant Chief Counsel, of Counsel.

[fols. 36-37] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 38] CLERK'S CERTIFICATE OF SERVICE OF ANSWER ON JUDGES (omitted in printing)

[fol. 39] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

PETITION OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY FOR LEAVE TO INTERVENE—Filed July 21, 1953

To The Honorable Judges of the District Court of the United States for the District of Nebraska, Omaha Division:

Now comes The Denver and Rio Grande Western Railroad Company and represents that it has an interest in the issues and matters involved in the above-entitled proceeding adverse to the interest of the plaintiffs herein and files this its petition for leave to intervene in and become a party defendant to said proceeding, with a right to be heard and to file an answer and other pleadings therein; and for cause shows:

1. That the petitioner, a corporation organized and existing under the laws of the State of Delaware, is a common carrier by railroad engaged in the transportation of persons

and property in intrastate, interstate and foreign commerce; that it owns and operates approximately 2400 miles of railroad in the States of Colorado, New Mexico and Utah; that it has interchange track connections and interchanges traffic with the Union Pacific at Denver, Colorado, [fol. 40] and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific at Ogden, and with the Western Pacific at Salt Lake City. The Rio Grande also has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, the Santa Fe and the Colorado and Southern, which is a part of the Burlington System. At Colorado Springs the Rio Grande interchanges traffic with the Santa Fe and the Rock Island. At Pueblo, Colorado, it interchanges traffic with the Santa Fe, the Colorado and Southern, and the Missouri Pacific. At Walsenburg, Colorado, it interchanges traffic with the Colorado and Southern, and at Trinidad, Colorado, with the Santa Fe and the Colorado and Southern.

2. The petitioner was the complainant in the proceeding before the Interstate Commerce Commission, the decision and order in which the plaintiffs herein seek to enjoin and set aside. By that complaint petitioner sought an order from the Interstate Commerce Commission requiring plaintiffs herein and other defendants in that case to establish joint rates on freight traffic via the route of the complainant through its Colorado and Utah gateways, between (a) points on the Union Pacific or its connections in Utah north of Ogden and in Idaho, Montana, Oregon, Washington and British Columbia, and (b) Colorado common points, such as Denver, Colorado Springs, Pueblo, Trinidad, etc., and points east thereof; and between Utah common points and the northwest territory served by the Union Pacific and its connections already described. In its decision of January 12, 1953, reported in 287 I. C. C. 611, the Commission granted a part of the relief sought by the petitioner as complainant in the proceeding described. It is that decision of the Commission which the plaintiffs seek to annul, set aside and enjoin in the instant proceeding.

[fol. 41] 3. Under the provisions of Section 2323 of the Judicial Code, 28 U. S. C. 2323, the petitioner is authorized to intervene in the above-entitled proceeding as of right.

Wherefore, petitioner prays for an order granting it leave to intervene as a defendant in the above-entitled case and to file an answer or other pleading herein with the right to have notice and to be treated in all other respects as if it had been named as defendant, and for such other and further relief as the Court shall determine.

Respectfully submitted, Harry L. Welch, Farm Credit Building, Omaha, Nebraska; Herbert M. Boyle, 1531 Stout Street, Denver, Colorado; Robert E. Quirk, 1116 Investment Building, Washington 5, D. C., Attorneys for Petitioner.

[fols. 42-43] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 44] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

MOTION OF WASHINGTON PUBLIC SERVICE COMMISSION, ET AL., TO INTERVENE AS PLAINTIFFS UNDER RULE 24, AND NOTICE THEREOF—Filed July 22, 1953

I

Washington Public Service Commission, Public Utilities Commissioner of Oregon, Board of Railroad Commissioners of the State of Montana, State Board of Equalization and Public Service Commission of Wyoming, State of Nebraska and Nebraska State Railway Commission, file this motion pursuant to Rule 24(a) and (c), (28 U. S. C. A., Federal Rules of Civil Procedure, Rules 17-51), to intervene as plaintiffs in the above-entitled proceeding.

II

Movants are duly constituted administrative agencies of the states named in the foregoing paragraph and are em-

powered and required to regulate and supervise railroads [fol. 45] and other transportation agencies operating intrastate in their respective states and to appear on behalf of and represent the public interest of their states in proceedings in which such public interest may be involved.

III

The complaint in the above-entitled proceeding seeks to enjoin, suspend, annul and set aside an order issued January 12, 1953, by the Interstate Commerce Commission (hereinafter called "Commission") in proceedings entitled Docket No. 30297, *The Denver and Rio Grande Western Railroad Company v. Union Pacific Railroad Company, et al.* Because the demands of the Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande"), in its complaint in said proceedings threatened seriously to jeopardize and harm the interest of shippers and the public generally in their respective states as well as the economic and general welfare of those states, movants intervened in said proceedings before the Commission and presented testimony and oral and written arguments in support of their contentions that the Commission should deny the demands of the Rio Grande and dismiss its complaint. Said order grants a large part of the Rio Grande's demands and potentially jeopardizes and threatens to deteriorate railroad service to shippers and citizens of said states without affording any additional transportation service or other compensating results or substantial benefits to anyone in any manner except the enhancement of the financial position of the Rio Grande.

IV

Movants believe said order is unlawful, null and void and they desire to intervene in the above-entitled proceeding and present to the Court on behalf of the public in their respective states the grounds upon which they contend that said order should be enjoined, annulled and set aside as referred to and shown in the attached pleading.

[fol. 46] Respectfully submitted, Don Eastvold, Attorney General of Washington; Robert L. Simpson,

Asst. Attorney General of Washington, Attorneys for Washington Public Service Commission, State Capitol, Olympia, Washington; John H. Carkin, C. W. Ferguson, Attorneys for Public Utilities Commissioner of Oregon, Public Service Building, Salem, Oregon; John H. Riskin, Attorney for Board of Railroad Commissioners of the State of Montana, Helena, Montana; Howard B. Black, Attorney General of Wyoming, Attorney for State Board of Equalization and Public Service Commission of Wyoming, Cheyenne, Wyoming; Clarence S. Beck, Attorney General of Nebraska; Bert L. Overcash, Assistant Attorney General of Nebraska, Attorneys for State of Nebraska and Nebraska State Railway Commission, State Capitol, Lincoln, Nebraska.

NOTICE OF MOTION (omitted in printing)

[fol. 47] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

CLAIMS FOR WHICH INTERVENTION IS SOUGHT AS PLAINTIFFS BY WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.—Filed July 22, 1953

I

Washington Public Service Commission, Public Utilities Commissioner of Oregon, Board of Railroad Commissioners of the State of Montana, State Board of Equalization and Public Service Commission of Wyoming, State of Nebraska and Nebraska State Railway Commission, seek intervention in the above-entitled proceeding upon the claims, and grounds and for the reasons and the purpose set forth in the complaint therein, which are hereby adopted and made the claims, grounds and reasons of these movants, together

with the matters hereinafter set forth, for enjoining, setting aside and annulling the order of the Interstate Commerce Commission dated January 12, 1953, in proceedings entitled Docket No. 30297, *The Denver and Rio Grande Western Railroad Company vs. Union Pacific Railroad Company, et al.*

[fol. 48]

II

Movants intervened in said proceedings before the Interstate Commerce Commission (hereinafter called "Commission") and presented testimony, written and oral arguments showing that the demands of the Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") in that proceeding, were inconsistent with and contrary to the National Transportation Policy and other legislation enacted by Congress, and granting such demands in whole or in substantial part, would, through the diversion of traffic and revenue from the Union Pacific Railroad Company to the Rio Grande, impair and deteriorate the railroad transportation service of shippers and the public in said states; would jeopardize and impair the ability of the Union Pacific Railroad Company to continue to render its satisfactory and efficient transportation service in those said states; would result in curtailment of train service and railroad employment in numerous cities, towns and communities in said states, thus impairing and deteriorating the economic welfare of their citizens; and would result in wasteful and uneconomic transportation through diversion of traffic to the longer routes of the Rio Grande.

III

The evidence and showing in said proceeding required a finding and conclusion that there is no public need for through routes and joint rates as requested by Rio Grande; that said respective intervener states and the shippers and citizens therein represent and constitute the public interest directly involved and controlling in this case; that the Rio Grande has no remedial interest in the claims of any shippers, cannot maintain this proceeding as a representative of any shipper or public interest and cannot obtain relief herein upon any claims of individual shippers; that

no complaints have been filed with and no demands have been made by any shipper or the public upon the respective [fol. 49] commissions of said states and that the only purpose served by granting the Rio Grande's demands would be to improve its financial position to the harm and detriment of citizens and the public in said states.

IV

Movants by this intervention seek an opportunity to present to the Court their reasons and arguments as indicated above and in the allegations set forth in the complaint in the above-entitled case upon which they believe the Commission's order of January 12, 1953, should be enjoined and annulled.

Respectfully submitted, Don Eastvold, Attorney General of Washington, Robert L. Simpson, Asst. Attorney General of Washington, Attorneys for Washington Public Service Commission, State Capitol, Olympia, Washington; John H. Carkin, C. W. Ferguson, Attorneys for Public Utilities Commissioner of Oregon, Public Service Building, Salem, Oregon; John H. Risken, Attorney for Board of Railroad Commissioners of the State of Montana, Helena, Montana; Howard B. Black, Attorney General of Wyoming, Attorney for State Board of Equalization and Public Service Commission of Wyoming, Cheyenne, Wyoming; Clarence S. Beck, Attorney General of Nebraska, Bert L. Overcash, Assistant Attorney General of Nebraska, Attorneys for State of Nebraska and Nebraska State Railway Commission, State Capitol, Lincoln, Nebraska.

[fol. 50] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

MOTION OF UNION PACIFIC RAILROAD COMPANY, ET AL., TO DENY AND STRIKE PETITION OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY FOR LEAVE TO INTERVENE—Filed July 23, 1953

Plaintiffs, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and Wabash Railroad Company, move that the Court deny and strike the document filed July 21, 1953, entitled "Petition of The Denver and Rio Grande Western Railroad Company for Leave to Intervene" in the above-entitled proceeding, on the ground that said petition does not conform to the requirements of Rule 24(c) of the Federal Rules of Civil Procedure (Title 28 U. S. C. A., Federal Rules of Civil Procedure, Rules 17-51).

In support of their motion, plaintiffs invite the Court's attention to the fact that said petition does not inform the Court or the parties to the above-entitled suit of the claim or defense for which intervention is sought and is not accompanied by a pleading setting forth the claim or defense for which intervention is sought. In support of this motion, plaintiffs respectfully invite the Court's attention to *Cowan v. Tipton*, 1 F. R. D. 694; *Mullins v. De Soto Securities Co.*, 2 F. R. D. 502, 507; *Miami County Nat. Bank of Paola, Kan. v. Bancroft*, 121 F. 2d 921, 925; and *Interna-*
[fol. 51] *tional Brotherhood, Etc. v. Keystone F. Lines*, 123 F. 2d 326, 328.

Respectfully submitted, Elmer B. Collins, 1416 Dodge Street, Omaha 2, Nebraska; F. O. Steadry, 400 West Madison Street, Chicago 6, Illinois; Conrad Olson, Northern Pacific Railway Bldg., 5th &

Jackson Streets, St. Paul 1, Minnesota; L. E. Torinus, Jr., 175 East 4th Street, St. Paul 1, Minnesota; Roland J. Lehman, 80 East Jackson Blvd., Chicago 4, Illinois; Carson L. Taylor, 516 West Jackson Blvd., Chicago 6, Illinois; Eugene S. Davis, Railway Exchange Building, St. Louis 1, Missouri, Attorneys for Plaintiffs.

NOTICE OF MOTION (omitted in printing)

[fol. 52] CERTIFICATE OF SERVICE (omitted in printing)

[fols. 53-53c] CLERK'S CERTIFICATE OF SERVICE OF NOTICE OF HEARING ON MOTIONS (omitted in printing)

[fol. 54] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ALLOWING THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY TO WITHDRAW ITS PETITION OF INTERVENTION—August 14, 1953

On application duly made in court for leave of The Denver and Rio Grande Western Railroad Company to withdraw its petition to intervene heretofore filed in the above-entitled proceeding;

It Is Ordered that leave be and the same is hereby granted to The Denver and Rio Grande Western Railroad Company to withdraw its petition for leave to intervene heretofore filed in this cause.

Dated August 14, 1953.

By the Court, John W. Delehant, United States District Judge.

[fol. 55] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

AMENDED PETITION OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY FOR LEAVE TO INTERVENE—Filed August 17th, 1953.

To The Honorable Judges of the District Court of the United States for the District of Nebraska, Omaha Division:

Now comes The Denver and Rio Grande Western Railroad Company and represents that it has an interest in the issues and matters involved in the above-entitled proceeding adverse to the interest of the plaintiffs herein and files this its amended petition for leave to intervene in and become a party defendant to said proceeding, with a right to be heard and to file an answer and other pleadings therein; and for cause shows:

1. That the petitioner, a corporation organized and existing under the laws of the State of Delaware, is a common carrier by railroad engaged in the transportation of persons and property in intrastate, interstate and foreign commerce; that it owns and operates approximately 2400 miles of railroad in the States of Colorado, New Mexico and Utah; that it has interchange track connections and interchanges traffic with the Union Pacific at Denver, Colorado, [fol. 56] and at Ogden, Salt Lake City and Provo, Utah; with the Southern Pacific at Ogden, and with the Western Pacific at Salt Lake City. The Rio Grande also has interchange track connections and interchanges traffic at Denver with the Rock Island, the Burlington, the Santa Fe and the Colorado and Southern, which is a part of the Burlington System. At Colorado Springs the Rio Grande interchanges traffic with the Santa Fe and the Rock Island. At Pueblo, Colorado, it interchanges traffic with the Santa Fe, the Colorado and Southern, and the Missouri Pacific. At Wal-

senburg, Colorado, it interchanges traffic with the Colorado and Southern, and at Trinidad, Colorado, with the Santa Fe and the Colorado and Southern.

2. The petitioner was the complainant in the proceeding before the Interstate Commerce Commission, the decision and order in which the plaintiffs herein seek to enjoin and set aside. By that complaint petitioner sought an order from the Interstate Commerce Commission requiring plaintiffs herein and other defendants in that case to establish joint rates on freight traffic via the route of the complainant through its Colorado and Utah gateways, between (a) points on the Union Pacific or its connections in Utah north of Ogden and in Idaho, Montana, Oregon, Washington and British Columbia, and (b) Colorado common points, such as Denver, Colorado Springs, Pueblo, Trinidad, etc., and points east thereof; and between Utah common points and the northwest territory served by the Union Pacific and its connections already described. In its decision of January 12, 1953, reported in 287 I. C. C. 611, the Commission granted a part of the relief sought by the petitioner as complainant in the proceeding described. It is that decision of the Commission which the plaintiffs seek to annul, set aside and enjoin in the instant proceeding.

3. Under the provisions of Section 2323 of the Judicial Code, 28 U. S. C. 2323, the petitioner is authorized to intervene in the above-entitled proceeding as of right.

[fol. 57] 4. Petitioner, upon intervening herein, will show that, although the order of the Commission here assailed granted only part of the relief sought by petitioner in its complaint before the Commission, that order is not invalid for any of the reasons herein alleged by the plaintiffs, and therefore, the suit of the plaintiffs should be dismissed.

5. Accompanied herewith, pursuant to the provisions of Rule 24 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. A., is the answer of your petitioner, which answer sets forth the defense for which intervention is sought.

Wherefore, petitioner prays for an order granting it leave to intervene as a defendant in the above-entitled case and to file the answer which is tendered herewith, with the right to have notice and to be treated in all other respects as if

it had been named as defendant, and for such other and further relief as the Court shall determine.

Respectfully submitted, Harry L. Welch, 730 Farm Credit Building, Omaha 2, Nebraska; Herbert M. Boyle, 1531 Stout Street, Denver, Colorado; Robert E. Quirk, 1116 Investment Building, Washington 5, D. C., Attorneys for Petitioner.

[fols. 58-59] Certificate of Service (omitted in printing)

[fol. 60] [File endorsement omitted]

In the District Court of the United States for the District of Nebraska, Omaha

[Title omitted]

Answer of The Denver and Rio Grande Western Railroad Company, Intervening Defendant—Filed August 17, 1953

To the Honorable Judges of the District Court of the United States for the District of Nebraska, Omaha Division:

Your petitioner, The Denver and Rio Grande Western Railroad Company, hereinafter called the Rio Grande, pursuant to leave granted by this court to become an intervening defendant herein, files this its answer to the complaint of the plaintiffs. In filing this answer the Rio Grande does not waive but reserves the right to assail in a court of competent jurisdiction the validity of that part of the order of the Interstate Commerce Commission which arbitrarily imposed territorial and other restrictions in respect to the joint competitive rates prescribed and arbitrarily failed and refused to prescribe the joint competitive rates and competitive routes on all of the traffic and between all of the points involved in the complaint of the Rio Grande before that Commission. The Rio Grande now and at all times hereafter saving and reserving to itself all rights and all

manner of benefit and advantage of exception to the many [fol. 61] errors and insufficiencies contained in the complaint, for answer thereunto or unto so much of such parts thereof as it is advised that it is material for it to answer, answers and says:

I

The Rio Grande admits the allegations of paragraphs I to III, inclusive, of the complaint.

II

The Rio Grande admits the allegations of paragraph IV of the complaint herein, but refers to its complaint filed with the Interstate Commerce Commission August 1, 1949, described in paragraph IV of the complaint, for a more full and complete statement as to the relief sought by the Rio Grande in that complaint.

III

Answering the allegations of paragraph V of the complaint, the Rio Grande admits that the plaintiffs and 41 other defendants, out of a total of 217 defendants, filed answers to the complaint of the Rio Grande. For answers to the remaining allegations of paragraph V of the complaint, the Rio Grande refers the court to the complaint filed with the Interstate Commerce Commission which is a part of the record before the court, for a statement as to the allegations made therein.

IV

The Rio Grande admits the allegations of paragraph VI of the complaint and avers that the American Short Line Railroad Association also intervened in support of the complaint of the Rio Grande before the Commission.

V

The Rio Grande admits the allegations of paragraph VII of the complaint, except that it alleges that the Rio Grande, [fol. 62] as well as the Union Pacific Railroad Company, has numerous branch lines connecting with and extending from its main lines in Utah and Colorado.

VI

Answering the allegations of paragraph VIII of the complaint, the Rio Grande admits that the first three sentences thereof are substantially correct; the Rio Grande neither admits nor denies the remaining allegations of paragraph VIII because they are conclusions and argumentative in character which require no further answer. The Rio Grande denies that the diversion of traffic to it would short-haul or deprive the Union Pacific Railroad Company of its present haul to the extent of about 1,000 miles, and would deprive other railroad plaintiffs herein of their entire haul on many thousand carloads of traffic annually. The Rio Grande alleges that the joint competitive rates and the competitive routes via the Rio Grande sought by it and approved in part by the Interstate Commerce Commission in its report and order will in numerous instances result in longer hauls and in larger revenue to the Union Pacific than it now obtains in connection with its participation with plaintiffs and other railroads in numerous other joint competitive rates and routes.

VII

Answering the allegations of the first sentence of paragraph IX of the complaint, the Rio Grande admits that the joint rates therein described were canceled in 1906 and in 1912, but denies that the joint rates were canceled with the approval of the Interstate Commerce Commission, and the Rio Grande alleges that the through routes established in the year 1897 on the freight traffic involved via Ogden and Salt Lake City, Utah, and the route of the Rio Grande between points on the Oregon Short Line Railroad and the [fol. 63] Oregon Railroad and Navigation Company and points such as Trinidad, Pueblo, Canyon City, Colorado Springs, Denver and other Colorado common points and points east thereof, were not canceled in 1906 or 1912 by the tariffs which canceled the joint rates, or by any other means then or later adopted by plaintiffs, or any of them, but that such through routes continued in effect and are still in effect. The Rio Grande denies the allegations in the last sentence of paragraph IX.

VIII

The Rio Grande denies the allegations of paragraph X of the complaint and alleges that said allegations are neither relevant nor material to any of the issues that were before the Commission or to any of the issues that are before this court.

IX

The Rio Grande admits the allegations of paragraphs XI, XII and XIII of the complaint, but refers the court to the report and order of the Commission of January 12, 1953, annexed to the complaint as Appendix "B", (287 I. C. C. 611), for a more full and complete statement as to the findings, reasons and conclusions of the Commission than is recited in the excerpt quoted in paragraph XII of the complaint.

X

Answering the allegations of paragraph XIV of the complaint, the Rio Grande denies that the order and decision of the Commission is invalid for any of the reasons set forth in that paragraph. The Rio Grande further alleges that many, if not most of the averments in paragraph XIV of the complaint are mere conclusions and are argumentative in character, which require no further answer.

[fol. 64]

XI

Answering the allegations of paragraph XV of the complaint, the Rio Grande denies that the order of the Interstate Commerce Commission of January 12, 1953, if permitted to become effective, would cause irreparable injury and damage to plaintiffs.

XII

Except as herein expressly admitted, the Rio Grande denies each and every allegation contained in the complaint.

All of which matters and things the Rio Grande is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Harry L. Welch, Farm Credit Building, Omaha, Nebraska; Herbert M. Boyle, The Denver and Rio

Grande Western Railroad Company, 1531 Stout Street, Denver, Colorado; Robert E. Quirk, 1116 Investment Building, Washington 5, D. C.. Attorneys for The Denver and Rio Grande Western Railroad Company, Intervening Defendant.

[fols. 65-66] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 67] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

Civ. 76-53

ORDER GRANTING MOTION TO INTERVENE AT WASHINGTON PUBLIC SERVICE COMMISSION, ET AL.—August 14, 1953

On this 14th day of August, 1953, the Motion to Intervene as Plaintiffs of Washington Public Service Commission, Public Utilities Commissioner of Oregon, Board of Railroad Commissioners of the State of Montana, State Board of Equalization and Public Service Commission of Wyoming, State of Nebraska and Nebraska State Railway Commission, came on for hearing, pursuant to notice, and in default of any opposition thereto.

It is ordered that said Motion to Intervene as Plaintiffs be and the same is hereby granted.

John W. Delehant, United States District Judge.

[fol. 68] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ALLOWING AMENDED PETITION OF INTERVENTION OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY—Filed August 18, 1953.

On application duly made in Court for leave of the Denver and Rio Grande Western Railroad Company to intervene, as party defendant, in the above-entitled cause;

It Is Ordered that leave be and the same is hereby granted to the Denver and Rio Grande Western Railroad Company to intervene in this cause, and it is hereby allowed to enter its appearance in said cause, to file its answer in intervention to appear by counsel and to defend as fully as if named as a defendant by the complaint.

By the Court: John W. Delehant, United States District Judge.

[fol. 69] [File endorsement omitted]

In the United States District Court for the District of Nebraska, Omaha Division

[Title omitted]

Answer of The United States—Filed August 19, 1953.

The United States of America (hereinafter referred to as the United States), one of the defendants in this action, answering the complaint filed herein, says:

1. Answering the allegations contained in paragraphs I and II of the complaint, the United States admits the same, but respectfully refers the Court to the order of the Commission of January 12, 1953, which is attached as Appendix A to the complaint, for a complete and accurate statement of the matters contained in the order.

2. Answering the allegations contained in paragraph III of the complaint, the United States admits the same.

3. Answering the allegations contained in paragraph IV of the complaint, the United States admits that the Denver and Rio Grande Western Railroad Company filed a complaint before the Commission on August 1, 1949. This complaint is a part of the record before the Commission in this case, which will be submitted at the trial, and the Court is respectfully referred to the complaint for a true and accurate statement of all the matters contained therein. In so far as the allegations in paragraph IV of the complaint are inconsistent therewith, they are hereby denied.

[fol. 70] 4. Answering the allegations contained in para-

graph V of the complaint, the United States admits that answers to the complaint before the Commission were filed by the Union Pacific Railroad Company and numerous other defendants. The Court is respectfully referred to the complaint itself for the matters alleged therein, and in so far as the allegations contained in paragraph V of this complaint are inconsistent with the complaint before the Commission they are hereby denied.

5. Answering the allegations contained in paragraph VI of the complaint, the United States admits the same.

6. Answering the allegations contained in paragraph VII of the complaint, the United States avers that it does not have sufficient knowledge and information to form a belief as to the truth of such allegations and therefore denies the same.

7. Answering the allegations contained in paragraph VIII of the complaint, the United States admits the first four sentences thereof. With respect to the remaining allegations in the paragraph, the United States avers that they are argumentative in character and require no answer.

8. Answering the allegations contained in paragraph IX of the complaint, the United States avers that the allegations in said paragraph, which assert that no through routes and joint rates have ever been established between the Denver and Rio Grande Western Railroad Company and the Union Pacific Railroad Company, involve conclusions of law which require no answer. Further answering paragraph IX of the complaint, the United States denies that the Commission approved the cancellation of any joint rates between the Denver and Rio Grande Western Railroad Company and the Union Pacific Railroad Company in 1906 and 1912. With respect to the other allegations in paragraph IX of the complaint, the United States avers that it does not have [fol. 71] sufficient knowledge and information to form a belief as to the truth of such allegations, and therefore denies the same.

9. Answering the allegations contained in paragraph X of the complaint, the United States avers that it does not have sufficient knowledge and information to form a belief as to the truth of such allegations, and therefore denies the same. The United States further avers that the allegations contained in paragraph X of the complaint are immaterial

to the issues involved in this case, and in many respects are improper in their implications and should be completely disregarded by the Court.

10. Answering the allegations contained in paragraph XI of the complaint, the United States admits the same.

11. Answering the allegations contained in paragraph XII of the complaint, the United States respectfully refers the Court to the report and decision of the Commission attached to Appendix B to the complaint for a complete and accurate statement of the matters contained therein. In so far as the allegations of paragraph XII of the complaint are inconsistent with the report and decision attached to the complaint, they are hereby denied.

12. Answering the allegations contained in paragraph XIII of the complaint, the United States admits the same.

13. Answering the allegations contained in paragraph XIV of the complaint, the United States denies each and every allegation contained therein.

14. Answering the allegations contained in paragraph XV of the complaint, the United States denies that the plaintiffs will be irreparably injured by the order of the Commission of January 12, 1953. All other allegations in this paragraph of the complaint are admitted.

15. For further answer to the complaint, the United States avers that the order of the Commission assailed in this action was entered pursuant to its statutory authority after full and fair hearing upon substantial evidence, that [fol. 72] the report of the Commission is clear and carefully drawn and contains all required findings, and that the order is valid in all respects.

Wherefore, having fully answered the allegations in the complaint, the United States prays that the relief sought be denied, and that the complaint be dismissed with costs to the plaintiffs.

James E. Kilday, E. Riggs McConnell, Special Assistants to the Attorney General, Department of Justice, Washington 25, D. C., Attorneys for the United States of America. Stanley N. Barnes, Assistant Attorney General. Joseph T. Votava, United States Attorney.

Certificate of Service (omitted in Printing)

[fol. 73] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

AMENDED ORDER ORGANIZING THREE-JUDGE COURT—September 21, 1953

The above named plaintiffs having filed suit which is now pending in the above entitled court, seeking temporary and permanent injunction enjoining, suspending, annulling and setting aside a certain order of the Interstate Commerce Commission dated January 12, 1953, on the grounds, among others, that said order is and the enforcement thereof will be violative of certain provisions of the Constitution of the United States; and said application for temporary injunction having been presented to the Honorable John W. Delehant, United States District Judge for the District of Nebraska, and said Judge having notified the Chief Judge of the United States Court of Appeals for the Eighth Circuit thereof;

It is now here ordered that Honorable Harvey M. Johnsen, United States Circuit Judge, and Honorable John [fol. 74] C. Collett, United States Circuit Judge, be and they hereby are designated to sit with the above named Honorable John W. Delehant, United States District Judge for the District of Nebraska, to hear and determine said action and proceeding.

The order organizing a three-judge court herein, dated July 13, 1953, is hereby revoked and cancelled for the reason that the Honorable John B. Sanborn, United States Circuit Judge, has other engagements making it inadvisable for him to attempt to sit in this case.

Dated this 21st day of September, A. D. 1953.

Archibald K. Gardner, Chief Judge, United States Court of Appeals, for the Eighth Circuit.

[fols. 75-76] CLERK'S CERTIFICATE OF SERVICE OF AMENDED ORDER ORGANIZING THREE-JUDGE COURT (omitted in Printing)

[fol. 77] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION.

[Title omitted]

PETITION OF SECRETARY OF AGRICULTURE FOR LEAVE TO INTERVENE—Filed October 2, 1953

To the Honorable Judges of the United States District Court for the District of Nebraska, Omaha Division:

I

The Secretary of Agriculture of the United States, under Rule 24 of the Rules of Civil Procedure, hereby moves the Court for an order permitting him to intervene as a defendant in this action so that he may make and establish the defenses in the proposed answer attached hereto.

II

The Secretary of Agriculture was a party in interest in the proceeding before the Interstate Commerce Commis-[fol. 78] sion entitled "Docket No. 30297—*Denver & Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.*, out of which this court action arose; and he may intervene in this action as a matter of right, as contemplated by Title 7, section 1291, and Title 28, section 2323, of the United States Code. For convenience of the Court there is quoted below the said section 1291 of Title 7, being section 201 of the Agricultural Adjustment Act of 1938:

> "(a) The Secretary of Agriculture is authorized to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the Commission. Before hearing or disposing of any complaint (filed by any person other than the Secretary) with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, the Commission shall cause the Secretary to be notified, and, upon application by the Secretary, shall permit the Secretary to appear and be heard.

"(b) If such rate, charge, tariff, or practice complained of is one affecting the public interest, upon application by the Secretary, the Commission shall make the Secretary a party to the proceeding. In such case the Secretary shall have the rights of a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination. The liability of the Secretary in any such case shall extend only to liability for Court costs.

"(c) For the purposes of this section, the Interstate Commerce Commission is authorized to avail itself of the cooperation, records, services, and facilities of the Department of Agriculture.

"(d) The Secretary is authorized to cooperate with and assist cooperative associations of farmers making complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products."

Wherefore, the Secretary of Agriculture prays that an order be entered permitting him to intervene in this action and to file the proposed answer attached hereto.

[fol. 79] Respectfully submitted, by direction of the Secretary of Agriculture of the United States.

Charles W. Bucy, Associate Solicitor, Henry A. Cockrum, Attorney, Office of the Solicitor, United States Department of Agriculture, Washington 25, D. C.

[fol. 80] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ANSWER OF THE SECRETARY OF AGRICULTURE OF THE UNITED STATES

The Secretary of Agriculture of the United States, intervening defendant in the above-captioned action, for answer to the complaint filed herein states:

I

Answering the allegations contained in paragraphs I to III, inclusive, of the complaint, the Secretary admits the same.

II

Answering the allegations contained in paragraph IV of the complaint, the Secretary admits the same but respect-[fol. 81] fully refers the Court to the Complaint filed on August 1, 1949, in the administrative proceeding before the Commission entitled No. 30297—*Denver & Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.*, referred to in said paragraph, for a full and complete statement respecting the matters contained in the complaint in the administrative proceeding.

III

Answering the allegations contained in paragraph V of the complaint, the Secretary admits the first sentence thereof. The Court is respectfully referred to the complaint filed on August 1, 1949, in the administrative proceeding before the Commission for a full and complete statement respecting the allegations contained therein and insofar as the allegations in paragraph V of the complaint herein are inconsistent with the complaint in the administrative proceeding they are denied.

IV

Answering the allegations contained in paragraph VI of the complaint, the Secretary admits the same.

V

Answering the allegations contained in paragraph VII of the complaint, the Secretary admits the same except that he avers that the Denver & Rio Grande Western Railroad Company and the Union Pacific Railroad Company have numerous branch lines connecting with and extending from their respective main lines in Utah and Colorado.

VI

Answering the allegations contained in paragraph VIII of the complaint, the Secretary admits the statements contained in the first four sentences thereof but avers that the remaining allegations in the paragraph are argumentative in character and require no answer.

[fol. 82]

VII

Answering the allegations contained in paragraph IX of the complaint, the Secretary admits that the joint rates were cancelled but denies that such action was taken with approval of the Commission and denies the remaining allegations in the paragraph.

VIII

Answering the allegations contained in paragraph X of the complaint, the Secretary avers that he does not have sufficient knowledge and information to form a belief as to the truth of such allegations, and therefore denies the same and avers that the allegations are immaterial to any issues before this Court.

IX

Answering the allegations contained in paragraphs XI, XII and XIII of the complaint, the Secretary admits the same but respectfully refers the Court to the decision of the Commission in No. 30297—*Denver & Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.*, attached as Appendix B to the complaint, for a full statement of the conclusions and findings of the Commission.

X

Answering the allegations contained in paragraph XIV of the complaint, the Secretary denies that the order of the Commission is invalid for any of the reasons set forth in the said paragraph.

XI

Answering the allegations contained in paragraph XV of the complaint, the Secretary denies that the Commission's order, if permitted to become effective, would irreparably injure and damage the plaintiffs.

[fol. 83] Wherefore, having fully answered the allegations in the complaint, the Secretary prays that the relief sought be denied and that the said complaint be dismissed.

Respectfully submitted, by direction of the Secretary of Agriculture of the United States. Charles W. Bucy, Associate Solicitor; Henry A. Cockrum, Attorney, Office of the Solicitor, United States Department of Agriculture, Washington 25, D. C.

[fols. 84-85] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 86] CLERK'S CERTIFICATE OF SERVICE OF PETITION FOR LEAVE TO INTERVENE (omitted in printing)

[fol. 87] CLERK'S CERTIFICATE OF SERVICE OF NOTICE OF HEARING (omitted in printing)

[fol. 88] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER GRANTING LEAVE TO INTERVENE TO SECRETARY OF AGRICULTURE—Oct. 8, 1953

On this 8th day of October, 1953, this cause comes on for ruling on the petition for leave to intervene filed herein on October 2, 1953 by the Secretary of Agriculture of the United States.

On consideration of such application, the court finds that it should be granted and allowed.

It is, Therefore, Considered and Ordered:

1. That the Petition for Leave to Intervene filed herein by the Secretary of Agriculture of the United States be and it hereby is granted and allowed; that the Secretary of Agriculture of the United States be and he hereby is permitted to intervene in this action and to file herein his answer, copy of which is attached to his Petition for Leave to Intervene;

2. That the clerk transmit forthwith copies of this order to counsel in the case.

By the Court: John W. Delehant Judge, U.S. District Court.

[fol. 89] CLERK'S CERTIFICATE OF SERVICE OF ORDER GRANTING LEAVE TO INTERVENE (Omitted in printing)

[fol. 90] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

MOTION OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL TO INTERVENE AS PLAINTIFFS UNDER RULE 24, AND NOTICE THEREOF—Filed Oct. 15, 1953

I.

This motion to intervene as plaintiffs in the above-entitled proceeding is filed pursuant to Rule 24 (a) and (c) (28 U.S.C.A., Federal Rules of Civil Procedure, Rules 17-51) by M. P. Caveny of Omaha, Nebraska, and the employees of the Union Pacific Railroad Company who are represented by the following standard railroad labor organizations:

Brotherhood of Locomotive Engineers,
Brotherhood of Locomotive Firemen and Enginemen,
Order of Railway Conductors,
Brotherhood of Railroad Trainmen,
American Train Dispatchers Association,
Railroad Yardmasters of America,
Order of Railroad Telegraphers,
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes,
Brotherhood of Railroad Signalmen of America,
Brotherhood of Maintenance of Way Employes,
American Railway Supervisors Association,
International Association of Machinists,
International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America,
[fol. 91] International Brotherhood of Blacksmiths, Drop Forgers and Helpers,
Sheet Metal Workers International Association,
International Brotherhood of Electrical Workers,
Brotherhood Railway Carmen of America,
International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers.

II.

Movants are duly constituted and recognized collective bargaining representatives of employees of Union Pacific Railroad Company, designated as such by the National Mediation Board under the provisions of the Railway Labor Act. The Congress has permitted them to intervene, in Section 17, (11) of the Interstate Commerce Act (49 U.S.C.A. § 17 (11)) reading as follows:

> *Intervention of representatives of employees.* (11) Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this chapter and chapters 8 and 12 of this title affecting such employees.

The above right of intervention was held to be absolute, in *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U.S. 519 (526-7). The movants have an interest in the above-entitled civil action because they are adversely affected by the order issued under date of January 12, 1953 by the Interstate Commerce Commission (hereinafter called the Commission) because the placing into effect of that order will result in the loss of employment by many of the movants, and the displacement and downgrading of others, and the necessity of removal of their families and homes by others to different localities of residence. The movants have an interest because this proceeding involves matters which embrace their wages and working conditions and will exercise a vital effect upon the movants, their families and dependents.

M. P. Caveny, of Omaha, Nebraska, is the General Chairman of the Brotherhood of Locomotive Engineers on the Union Pacific Railroad Company, and has been designated to speak for and represent in this action not only the locomotive engineers, but all Union Pacific employees who are represented by the standard railroad labor organizations named in this motion to intervene as plaintiffs. They were duly admitted by the Interstate Commerce Commission as interveners in the proceeding entitled Docket No. 30297, *The Denver and Rio Grande Western Railroad Company* vs. *Union Pacific Railroad Company, et al,* and were permitted to introduce testimony and evidence at the

hearings, and appeared in oral argument and briefs, as [fol. 92] parties in interest in the proceeding before the Commission, and therefore they have a statutory absolute right under the provisions of U.S.C. Title 28, § 45a to appear as parties in the Civil Action herein.

III.

The complaint in the above-entitled proceeding seeks to enjoin, suspend, annul and set aside an order issued under date January 12, 1953, by the Commission in proceedings entitled Docket No. 30297, *The Denver and Rio Grande Western Railroad Company* v. *Union Pacific Railroad Company, et al.* These railroads will be referred to below as the Rio Grande, and the Union Pacific. Because the demands of the Rio Grande in its complaint in said proceedings were proven to seriously jeopardize and harm the interests of the Union Pacific employees, as well as the shippers and the general public, movants intervened in said proceedings before the Commission and presented testimony, written evidence, and oral and written arguments in support of the contention by the Union Pacific employees that the Commission should deny the demands of the Rio Grande and dismiss the complaint. The order of the Commission, however, granted a large part of the Rio Grande's demands, thereby jeopardizing the employment, seniority rights, earnings, pension rights, and other working conditions of the Union Pacific employees because of potential reductions in train service and consequent abolishing of non-operating employment, resulting from the diversion of traffic from the Union Pacific to the Rio Grande.

IV.

Movants verily believe said order by the Commission is unlawful, null and void, and would result in deterioration of railroad service to shippers and citizens in the affected States without providing additional transportation service or substantial advantages to anyone in any fashion except the benefit to the financial position of the Rio Grande. Movants desire to intervene in the above-entitled proceeding and present to the Court on behalf of the approximately [fol. 93] 55,000 employees of the Union Pacific the grounds

upon which they contend that said order should be enjoined, annulled and set aside as referred to and shown in the attached pleading.

Respectfully submitted, M. P. Caveny of Omaha, Nebraska, Chairman of The Union Pacific General, Chairmen's Association on behalf of the employees of Union Pacific Railroad Company who are represented by the following labor organizations: 1. Brotherhood of Locomotive Engineers, 2. Brotherhood of Locomotive Firemen and Enginemen, 3. Order of Railway Conductors, 4. Brotherhood of Railroad Trainmen, 5. American Train Dispatchers Association, 6. Railroad Yardmasters of America, 7. Order of Railroad Telegraphers, 8. Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, 9. Brotherhood of Railroad Signalmen of America, 10. Brotherhood of Maintenance of Way Employes, 11. American Railway Supervisors Association, 12. International Association of Machinists, 13. International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, 14. International Brotherhood of Blacksmiths, Drop Forgers and Helpers, 15. Sheet Metal Workers International Association, 16. International Brotherhood of Electrical Workers, 17. Brotherhood Railway Carmen of America, 18. International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers, Justus R. Moll, 1001 Connecticut Avenue, Washington 6, D. C., J. D. Cranny, 412 Farnham Building, Omaha 2, Nebraska, J. P. Moore, 412 Farnham Building, Omaha 2, Nebraska, Attorneys for said Movants.

[fol. 94] NOTICE OF MOTION (omitted in printing)

[fol. 95] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

CLAIMS FOR WHICH INTERVENTION IS SOUGHT AS PLAINTIFFS BY BROTHERHOOD OF LOCOMOTIVE ENGINEERS—Filed Oct. 15, 1953

I.

M. P. Caveny of Omaha, Nebraska, chairman of the Union Pacific General Chairmen's Association, for himself and on behalf of the approximately 55,000 employees of the Union Pacific Railroad Company (hereinafter called the Union Pacific) who are represented by the following standard railroad labor oganizations:

Brotherhood of Locomotive Engineers,
Brotherhood of Locomotive Firemen and Enginemen,
Order of Railway Conductors,
Brotherhood of Railroad Trainmen,
American Train Dispatchers Association,
Railroad Yardmasters of America,
Order of Railroad Telegraphers,
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes,
Brotherhood of Railroad Signalmen of America,
Brotherhood of Maintenance of Way Employes,
American Railway Supervisors Association,
International Association of Machinists,
International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America,
International Brotherhood of Blacksmiths, Drop Forgers and Helpers,
Sheet Metal Workers International Association,
[fol. 96] International Brotherhood of Electrical Workers,
Brotherhood Railway Carmen of America,
International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers,

seek intervention in the above-entitled proceeding upon the claims, and grounds and for the reasons and the purposes set forth in the complaint therein, which are hereby adopted and made the claims, grounds and reasons of these movants, together with the matters hereinafter set forth, for enjoining, setting aside and annulling the order of the Interstate Commerce Commission (hereinafter called the Commission) dated January 12, 1953, in proceedings entitled Docket No. 30297, *The Denver and Rio Grande Western Railroad Company* vs. *Union Pacific Railroad Company, et al.*

II.

Movants intervened in said proceedings before the Commission and presented testimony, evidence, written and oral arguments showing that the demands of the Denver and Rio Grande Western Railroad Company (hereinafter called the Rio Grande) in that proceeding were inconsistent with and contrary to the National Transportation Policy and other legislation enacted by the Congress of the United States, and that the granting of such demands or any portion of them would, through the diversion of traffic from the Union Pacific to the Rio Grande, result in the impairment and deterioration of railroad transportation service of the shippers and the public. It would jeopardize and impair the ability of the Union Pacific to continue rendition of its efficient and satisfactory transportation service, and result in curtailment of train service, and reduction of railroad employment in many cities and towns, causing drastic adverse effect upon the economic welfare of their citizens. The diversion of traffic from the Union Pacific to the Rio Grande would result in wasteful, uneconomic transportation on the longer, more mountainous routes of the Rio Grande.

III.

In the said proceeding before the Commission the evidence and showing required a finding and conclusion that no public need exists for through routes and joint rates as requested by the Rio Grande. The shippers, citizens, carrier employees and communities affected therein represent and constitute the public interest involved and controlling in this proceeding. The Rio Grande has no remedial in-

[fol. 97] terest in the claims of any shippers and cannot maintain this proceeding as a representative of any shipper or public interest and cannot obtain relief herein upon any claims of individual shippers. No complaints have been filed with the respective State commissions, and no demands have been made by any shipper or the public upon the State commissions. The only purpose served by granting any part of the Rio Grande's demands would be to improve the financial position of the Rio Grande to the harm and detriment of citizens, the employees of the Union Pacific and other carriers who are plaintiffs in this civil action, and the public.

IV.

The National Transportation Policy (49 U.S.C., preceding §§ 1) is the substantive law of the Interstate Commerce Act (hereinafter called the Act). All the provisions of the Act shall be administered within that declaration of policy by the Congress. The policy includes the phrase: "and to encourage fair wages and equitable working conditions;". Regularity of employment by means of seniority rights is an important working condition. Instead of preserving and encouraging regularity and continuity of employment, the Commission's order would destroy it for a large number of Union Pacific employees, thus creating employee wastage. In addition, a large number of other Union Pacific employees would be placed in adverse positions because of reductions in earnings, and being required to move to other localities in order to continue working for the Union Pacific. This would be contrary to the letter and spirit of the National Transportation Policy.

V.

The Commission in its report, January 12, 1953, outlined the disastrous adverse effect upon the conditions of employment of the Union Pacific employees but failed to include them in its General Discussion and Ultimate Fact Findings, or in its Conclusions. It left this problem hanging in the air, stating there is no specific provision in section 15 (3) or (4) requiring that conditions be imposed for the protection of employees who may be affected adversely by diversion of traffic from the Union Pacific to the Rio Grande. The

Commission had taken the same position regarding employee-protection under section 1 (18-20) of the Act, re- [fol. 98] fusing to impose conditions for employees adversely affected by abandonments, but after several years of such decisions, the matter went to the Supreme Court resulting in unanimous decision holding that specific power is not required in the statute and that the employees should be given full consideration under "public convenience and necessity" as well as "public interest." On the same date of the Commission's report and order, January 12, 1953, the Supreme Court upheld the doctrine of implied powers of the Commission in *American Trucking Associations, et al,* v. *United States and Interstate Commerce Commission,* 344 U.S. 298, 73 S. Ct. 307.

Movants believe the order of the Commission is unlawful, null and void, and should be enjoined by the Court, annulled and set aside. But in the alternative, if the Court should permit any part of the Commission's order to become effective, it should impose conditions for the protection of carrier-employees adversely affected pursuant to or as a result of the order, or the Court should remand the problem of employee-proteetion to the Commission with instructions that it shall impose suitable conditions for protection of carrier-employees.

VI.

Movants believe that the order of the Commission is unlawful also in that it failed to follow its own policy and practice in order proceedings which might adversely affect the carrier-employees involved. The practice provides: (1) if definitely shown that no employees will be affected, no condition is necessary; (2) if not definitely shown that no employees will be affected, jurisdiction is reserved for four years; (3) if shown that employees will be affected, conditions for their protection are prescribed (*Chicago & North Western Ry. Co. et al, merger,* 261 I.C.C. 672).

In the proceeding resulting in the Commission's report and order dated January 12, 1953, it was definitely shown that certain trains would be discontinued, and the total potential loss of employment was 5,144 persons. The Commission's order granted sufficient diversion of traffic to amount to 25% of the total potential, which would reduce

the loss in employment to 1,286 jobs. If the Rio Grande should succeed in getting only 20% of this potential traffic it would amount to loss of 257 jobs. The evidence proved that reduction in carloads of freight results in reduction of [fol. 99] carrier-employees. Freight trains are not operated unless there is sufficient freight to justify running a train.

The evidence is clear that under the Report and Order, there will be loss of employment and resulting adverse effects upon the Union Pacific's employees. Under the above-cited policy of the Commission, it should be required to make provisions for employee-protection. The Commission has found that it is not possible to estimate accurately how much traffic might be diverted, and therefore it cannot be said how many Union Pacific employees will be displaced, or to ascertain the names of the individual employees. Such has been true in cases under other sections of the Act, but the Commission has imposed conditions, or reserved jurisdiction therefor. The Court should enjoin the Report and Order, as null and void, or in the alternative, the Court should remand the proceeding to the Commission, instructing that employee-protection be provided.

VII

Although the Commission in its Report indicated that section 15 (3) and (4) do not specify protection for the employees, it is clear that the statutes give the Commission power to impose conditions. The Commission has given consideration to the adverse effect upon carrier-employees in previous orders, such as *Cancelation of Rates and Routes via Short Lines*, 245 I.C.C. 183. This proceeding involved five short line carriers. The through routes and joint rates were cancelled entirely on one of these small carriers, in which the employees made no protest, and the potential loss in revenue did not exceed $500 per year. In the other four carriers involved, cancelation was denied, in full or in part. The Commission stated: "The livelihood of these employees and their home investments are placed in jeopardy by the proposed cancelation, and their representatives appeared in opposition thereto." This is the situation of the Union Pacific employees in this civil action. Their livelihood and their home investments are placed in jeop-

ardy by the Commission's Report and Order dated January 12, 1953. The Order should be enjoined as null and void, or in the alternative, the Court should remand the proceeding and instruct the Commission to provide employee-protection.

VIII

The movants have requested employee-protection. The [fol. 100] measure of such protection has been spelled out by the Congress, in section 5 (2) (f) of the Act. The costs of such protection should be borne by the beneficiary of the Commission's order dated January 12, 1953, i.e., the Rio Grande. This principle is found in several decisions by the Commission, such as *Gulf, Mobile & Ohio R. Co., Purchase Securities*, 267 I.C.C. 145, 151; *Gulf, Mobile & Ohio R. Co., Abandonment*, 282 I.C.C. 311, 337; *International G. N. R. Co. Trustee Trackage Rights*, 282 I.C.C. 30, 37. It would be unjust and unreasonable to deprive the Union Pacific of hundreds of carloads of revenue freight by government order, and also require the Union Pacific to bear the expense of employee-wastage resulting from the order. The beneficiary should bear the expense, as the Commission has decreed in the cases cited. The expense will be reduced year by year through deaths, pensions, and the securing of other employment, and at the end of the protective period there will be no more expense.

Employee-protection is actually the charging of employee-wastage to operating expenses. When the carriers abandoned many steam locomotives which had been made obsolete by diesel power, they charged the steam locomotives to depreciation accounts built up from charges to operating expenses. If certain Union Pacific employees become unemployed because of the diversion of traffic to the Rio Grande, this employee-wastage should be compensated for the protective period from operating expenses of the beneficiary-carrier. It can reduce or eliminate the expense simply by giving employment to the adversely affected Union Pacific employees. The Commission's order will create no new traffic but will divert Union Pacific traffic to the Rio Grande. The Rio Grande will need more employees, and the Union Pacific will require less employees.

Employee-wastage is not a new idea. It has been before

the highest court. The Supreme Court held unanimously that a business may be required to carry the burden of employee-wastage in *United States and Interstate Commerce Commission* v. *Lowden et al*, 308 U.S. 225, 240, 60 S. Ct. 248, 256, 84 L.Ed. 208.

IX

The *Lowden* case was decided prior to the 1940 amendments to the Act. At the time it was decided, the only statutory grounds for employee-protection were "the public [fol. 101] interest" plus a statutory power by which the Commission may attach conditions to its order. In its unanimous decision, opinion by Mr. Justice Stone, the Court held the phrase "'public interest'" as used in the Transportation Act, 1920, includes the interests of the carrier-employees.

It is significant that section 15 (3) was added by the Transportation Act, 1920, and the "public interest" of section 15 (3) comes within the above definition by the Court. And section 15 (3 also includes the statutory power to attach conditions to the Commission's order. Here we find the same two factors which were present in the *Lowden case.*

Three years after the *Lowden* decision, the Supreme Court decided another case. In abandonments under section 1 (18-20) of the Act, the Commission had refused to impose conditions for employee-protection on the ground that section 1 (18-20) did not specifically make such provision, and this section was based upon "public convenience and necessity" rather than upon "public interest." Again the Supreme Court unanimously decided that employee-protection could be imposed, and the Commission has done so in many subsequent proceedings. (*Interstate Commerce Commission and Pacific Electric Ry. Co.* v. *Railway L.E.A. et al*, 315 U.S. 373, 378, 62 S. Ct. 717, 86 L.Ed. 904).

Section 15 (3) has these same factors, the basis for decision being the "public interest", and the power to impose conditions is given the Commission. In this proceeding the Commission has shown that employees of the Union Pacific will be affected adversely, but in its conclusions

it has left this problem unresolved. The Court should enjoin the Report and Order as null and void, or in the alternative, the Court should remand the proceeding to the Commission with directions that employee-protection be imposed.

X

Movants by this intervention request an opportunity to present to the Court their reasons and arguments as indicated above and in the allegations set forth in the com- [fol. 102] plaint in the above-entitled case upon which they believe the Commission's order dated January 12, 1953, should be enjoined and annulled.

Respectfully submitted,

M. P. Caveny of Omaha, Nebraska, Chairman of The Union Pacific General Chairmen's Association, for the employees of Union Pacific Railroad Company who are represented by the following labor organizations: Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors, Brotherhood of Railroad Trainmen, American Train Dispatchers Association, Railroad Yardmasters of America, Order of Railroad Telegraphers, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Brotherhood of Railroad Signalmen of America, Brotherhood of Maintenance of Way Employes, American Railway Supervisors Association, International Association of Machinists, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, International Brotherhood of Blacksmiths, Drop Forgers and Helpers, Sheet-Metal Workers International Association, International Brotherhood of Electrical Workers, Brotherhood Railway Carmen of America, International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers, Justus R. Moll, 1001 Connecticut Avenue, Washington 6, D. C., J. D. Cranny, 412 Farnham Building, Omaha 2, Nebraska, J. P. Moore, 412 Farnham

Building, Omaha 2, Nebraska, Attorneys for said Interveners.

October 15, 1953.

[fol. 103] Certificate of service (omitted in printing).

[fol. 104] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION UNDER RULE 24 OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.—October 19, 1953

On this 17th day of October, 1953 at 10 o'clock a.m., this cause comes on for hearing upon the motion under Rule 24 for leave to intervene, served and filed herein in behalf of M. P. Caveny, Chairman of The Union Pacific General Chairmen's Association, representing sundry labor organizations.

On consideration whereof, the court finds that said motion for leave to intervene is well taken and should be granted and allowed.

It is, therefore, considered and ordered:

1. That said motion for leave to intervene be and it hereby is granted and allowed;

2. That the moving party be and he hereby is given and granted leave to intervene herein, and to serve and file appropriate pleadings in furtherance of his intervention;

3. That the clerk transmit forthwith copies of this order to counsel in the case.

By the Court: John W. Delehaut, Judge, U. S. District Court.

[fol. 105] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER SETTING ACTION FOR TRIAL—October 17, 1953

On this 17th day of October, 1953 at 10 o'clock a.m., the undersigned, one of the judges of this court, and counsel for sundry parties hereto confer upon the subject of an appropriate date for the trial of this action, after the giving of notice to counsel of such conference.

On consideration whereof, the court finds that an appropriate date for the trial of this action on its merits is Monday, November 23, 1953 commencing at 10 o'clock a.m.

It is, therefore, considered and ordered:

1. That this action be and it hereby is set for trial on its merits before the duly constituted court of three judges, heretofore designated for membership upon the court, commencing at 10 o'clock a.m. on November 23, 1953;

2. That the clerk transmit forthwith copies of this order to counsel in the case.

By the Court: John W. Delehaut, Judge, U. S. District Court.

[fol. 106] Clerk's Certificate of Service of Order of Intervention and Order Setting Action for Trial (omitted in printing).

[fol. 107] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

PETITION OF IDAHO FARM BUREAU FEDERATION FOR LEAVE TO INTERVENE—Filed Nov. 5, 1953

To the Honorable Judges of the United States District Court for the District of Nebraska, Omaha Division.

Comes now The Idaho Farm Bureau Federation and hereby moves the court for an order pursuant to Rules 24 (a) and (c) of the Federal Rules of Civil Procedure permitting petitioner to intervene as a defendant in the above-entitled proceeding.

1. That the Idaho Farm Bureau Federation represents 11,000 farm families who are residents of the State of Idaho and is an Idaho corporation, with offices in Pocatello, Idaho, and has an important and pecuniary interest in the issues involved in the instant proceeding.

[fol. 108] 2. That petitioner was an intervening complainant before the Interstate Commerce Commission in the proceeding in which the order of that Commission is here assailed, and therefore is authorized to intervene in this proceeding as of right under the provisions of Section of 2323 of the Judicial Code, 28 U.S.C. 2323.

3. Accompanied herewith, pursuant to the provisions of Rule 24 (c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., is the answer of the petitioner, which answer sets forth the defense for which intervention is sought.

Wherefore, petitioner prays for an order granting it leave to intervene as a defendant in the above-entitled proceeding and to file the answer which is tendered herewith, with the right to have notice and to be treated in all

other respects as if it had been named as defendant, and for such other and further relief as the court shall determine.

Lloyd D. Browning, General Counsel Idaho Farm Bureau Fed., Raymond E. McGrath, Attorneys for Petitioner.

[fol. 109] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ANSWER OF THE IDAHO FARM BUREAU FEDERATION

Your petitioner, The Idaho Farm Bureau Federation, pursuant to leave granted by this court to become an intervening defendant herein, files this its answer to the complaint of the plaintiffs. The Idaho Farm Bureau Federation now and at all times hereinafter saving and reserving to itself all rights and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the complaint, for answer thereunto or unto so much of such parts thereof as it is advised that it is material for it to answer, answers and says:

I.

For its answer and to avoid reiteration and repetition, petitioner adopts as its own and as if pleaded herein the [fol. 110] answer, together with the reservations in the answer, filed in this court by The Denver and Rio Grande Western Railroad Company, an intervening defendant herein.

Wherefore, having answered the allegations in the complaint, The Idaho Farm Bureau Federation prays that the relief sought be denied, and that the complaint be dismissed with costs to the plaintiffs.

Lloyd D. Browning, General Counsel Idaho Farm Bureau Federation, Raymond E. McGrath, Attorneys for Petitioner.

[fol. 111] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION OF IDAHO FARM BUREAU FEDERATION UNDER RULE 24—November 5, 1953

On this 5th day of November, 1953, at 4:25 o'clock p.m., this cause comes on for hearing upon the motion under Rule 24 for leave to intervene, served and filed herein in behalf of The Idaho Farm Bureau Federation, which represents farm families who are residents of Idaho, and is an Idaho corporation with offices in Pocatello, Idaho.

On consideration whereof, the court finds that said motion for leave to intervene is well taken and should be granted and allowed.

It is, therefore, considered and ordered:

1. That said motion for leave to intervene be and it hereby is granted and allowed;

2. That the moving party be and he hereby is given and granted leave to intervene herein, and to serve and file appropriate pleadings in furtherance of his intervention;

3. That the clerk transmit forthwith copies of this order to counsel in the case.

By the Court: John W. Delehaut, Judge, U.S. District Court.

[fols. 112-117] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 118] CLERK'S CERTIFICATE OF SERVICE OF ORDER OF INTERVENTION—(omitted in printing)

[fol. 119] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

PETITION OF THE PUBLIC SERVICE COMMISSION OF UTAH FOR LEAVE TO INTERVENE—Filed November 9, 1953

To the Honorable Judges of the United States District Court for the District of Nebraska, Omaha Division:

Comes now The Public Service Commission of Utah and hereby moves the court for an order pursuant to Rules 24 (a) and (c) of the Federal Rules of Civil Procedure permitting petitioner to intervene as a defendant in the above-entitled proceeding.

1. That petitioner is an agency of the state of Utah, with offices in Salt Lake City, Utah. The citizens of the State of Utah have an important and pecuniary interest in the issues involved in the instant proceeding.

2. That petitioner was an intervening complainant before the Interstate Commerce Commission in the proceeding in which the order of that Commission is here assailed, and therefore is authorized to intervene in this proceeding as of right under the provisions of Section 2323 of the Judicial Code, 28 U.S.C. 2323.

[fol. 120] 3. Accompanied herewith, pursuant to the provisions of Rule 24 (c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., is the answer of the petitioner, which answer sets forth the defense for which intervention is sought.

Wherefore, petitioner prays for an order granting it leave to intervene as a defendant in the above-entitled proceeding and to file the answer which is tendered herewith, with the right to have notice and to be treated in all other respects as if it had been named as defendant, and for such other and further relief as the court shall determine.

Public Service Commission of Utah, E. R. Callister, Jr., Attorney General, State of Utah, By Peter M. Lowe, Deputy Attorney General, Raymond E. McGrath, First National Bank Building, Omaha, Nebraska, Attorneys for Petitioner.

[fol. 121] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ANSWER OF THE PUBLIC SERVICE COMMISSION OF UTAH

Your petitioner, The Public Service Commission of Utah, pursuant to leave granted by this court to become an intervening defendant herein, files this its answer to the complaint of the plaintiffs. The Public Service Commission of Utah now and at all times hereinafter saving and reserving to itself all rights and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the complaint, for answer thereunto or unto so much of such parts thereof as it is advised that it is material for it to answer, answers and says:

I

For its answer and to avoid reiteration and repetition, petitioner adopts as its own and as if pleaded herein the answer, together with the reservations in the answer, filed in this court by The Denver and Rio Grande Western Railroad Company, an intervening defendant herein.

[fol. 122] Wherefore, having answered the allegations in the complaint, the Public Service Commission of Utah prays that the relief sought be denied, and that the complaint be dismissed with costs to the plaintiffs.

Public Service Commission of Utah, E. R. Callister, Jr., Attorney General, State of Utah, By Peter M. Lowe, Deputy Attorney General, Raymond E. McGrath, First National Bank Building, Omaha, Nebraska, *Attorneys for Petitioner.*

[fols. 123-125] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 126] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION UNDER RULE 24 OF PUBLIC SERVICE COMMISSION OF UTAH—NOV. 9, 1953

On this 9th day of November, 1953, at 2:58 o'clock p.m., this cause comes on for hearing upon the motion under Rule 24 for leave to intervene, served and filed herein in behalf of the Public Service Commission of Utah which is an agency of the State of Utah with offices in Salt Lake City, Utah.

On consideration whereof, the court finds that said motion for leave to intervene is well taken and should be granted and allowed.

It is, therefore, considered and ordered:

1. That said motion for leave to intervene be and it hereby is granted and allowed;

2. That the moving party be and he hereby is given and granted leave to intervene herein, and to serve and file appropriate pleadings in furtherance of his intervention;

3. That the clerk transmit forthwith copies of this order to counsel in the case.

By the Court: John W. Delehant, Judge, U. S. District Court.

[fol 127] CLERK'S CERTIFICATE OF SERVICE OF ORDER OF INTERVENTION (omitted in printing)

[fol. 128] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

PETITION OF BROTHERHOOD COMMITTEES ON THE DENVER & RIO GRANDE WESTERN RAILROAD CO., FOR LEAVE TO INTERVENE—Filed November 13, 1953

To the Honorable Judges of the United States District Court for the District of Nebraska, Omaha Division:

Come now the following Brotherhood Committees on The Denver and Rio Grande Western Railroad Company, to-wit:

1. General Committee of Adjustment of Brotherhood of Locomotive Engineers;
2. General Grievance Committee of Brotherhood of Locomotive Firemen and Enginemen;
3. General Committee of Adjustment of Order of Railway Conductors;
4. General Grievance Committee of Brotherhood of Railroad Trainmen;
5. General System Committee of American Train Dispatchers Association;
6. General Grievance Committee of Railroad Yardmasters of America;
7. General Committee of System Division 49 of Order of Railroad Telegraphers;
8. System Board of Adjustment of Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees;

[fol. 129] 9. General Committee of Brotherhood of Railroad Signalmen of America;

10. Mountain and Plains Federation of Brotherhood of Maintenance of Way Employees;
11. General Adjustment Committee of Switchmen's Union of North America;
12. District No. 20 of International Association of Machinists;
13. District No. 22 of International Brotherhood of

Boilermakers, Iron Ship Builders and Helpers of America;

14. System Council No. 27 of International Brotherhood of Blacksmiths, Drop Forgers and Helpers;
15. District Council No. 10 of Sheet Metal Workers International Association;
16. System Council No. 21 of International Brotherhood of Electrical Workers;
17. Rio Grande-Western Pacific and Affiliated Lines Joint Protective Board of Brotherhood of Railway Carmen of America;
18. System Council No. 33 of International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers;
19. Protective Order of Dining Car Waiters and Attendants, Local No. 384 of Hotel and Restaurant Employees International Alliance, AF of L;
20. Local No. 383 of Hotel and Restaurant Employees International Alliance, AF of L;

and hereby move the Court for an order pursuant to Rules 24(a) and (c) of the Federal Rules of Civil Procedure permitting petitioners to intervene as defendants in the above entitled proceeding, and as ground therefor state:

1. That petitioners are all the functioning and carrier-wide Brotherhood Committees on The Denver and Rio Grande Western Railroad Company and represent all employees on The Denver and Rio Grande Western Railroad Company system under the Railway Labor Act and have an important interest in this proceeding and in the rights of Labor as these rights will be affected by a decision of the issues here involved;

2. That in the proceeding before the Interstate Commerce Commission in which was entered the order herein [fol. 130] assailed, petitioners were intervening complainants and under the provisions of Sec. 2323 of the Judicial Code 28 U.S.C.A. 2323, petitioners are authorized to intervene in this proceeding as of right;

3. That accompained herewith as required by the provisions of Rule 24(c) of the Federal Rules of Civil Pro-

cedure, 28 U.S.C.A., is the answer of petitioners which answer sets forth the defense for which intervention is sought;

Wherefore petitioners pray for an order granting them leave to intervene as defendants in the above entitled proceeding and permitting them to file the answer tendered herewith, with right to have notice and be treated in all respects as if named defendants, and for such other and further relief as the Court shall deem proper in the premises.

Raymond E. McGrath, First National Bank Building, Omaha, Nebraska; Alden T. Hill, Woolworth Building, Fort Collins, Colorado, Attorneys for Petitioners.

[fol. 131] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ANSWER OF INTERVENERS, BROTHERHOOD COMMITTEES ON THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY

Your petitioners, being all the Brotherhood Committees on the Denver and Rio Grande Western Railroad, those hereinafter named following the signature of their attorneys, pursuant to leave granted by this Court to become an intervening defendants herein, file their answer to the complaint of the plaintiffs as follows and say:

1. That these petitioners and intervening defendants save and reserve all rights and manner of benefits and advantage of exceptions to the errors and insufficiencies in the complaint herein;

2. For their answer and to avoid repetition, these petitioners and intervening defendants adopt as their own answer as if pleaded herein the answer, together with the reservations in the answer, filed in this Court by the Denver and Rio Grande Western Railroad Company, an intervening defendant herein, so that the allegations, admissions and denials, of such answer are the allegations,

[fol. 132]

admissions and denials, made by these intervening defendants.

Wherefore, these intervening defendants pray that the relief sought be denied, and that the complaint be dismissed at plaintiffs costs.

Raymond E. McGrath, First National Bank Building, Omaha, Nebraska; Alden T. Hill, Woolworth Building, Fort Collins, Colorado.

Attorneys for Intervening Defendants:

General Committee of Adjustment of Brotherhood of Locomotive Engineers;
General Grievance Committee of Brotherhood Locomotive Firemen and Enginemen;
General Committee of Adjustment or Order of Railway Conductors;
General Grievance Committee of Brotherhood of Railroad Trainmen;
General System Committee of American Train Dispatchers Association;
General Grievance Committee of Railroad Yardmasters of America;
General Committee of System Division 49 of Order of Railroad Telegraphers;
System Board of Adjustment of Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees;
General Committee of Brotherhood of Railroad Signalmen of America;
Mountain and Plains Federation of Brotherhood of Maintenance of Way Employees;
General Adjustment Committee of Switchmen's Union of North America;
District No. 20 of International Association of Machinists;

[fol. 133] District No. 22 of International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America;
System Council No. 27 of International Brotherhood of Blacksmiths, Drop Forgers and Helpers;
District Council No. 10 of Sheet Metal Workers International Association;

System Council No. 21 of International Brotherhood of Electrical Workers;
Rio Grande-Western Pacific and Affiliated Lines Joint Protective Board of Brotherhood of Railway Carmen of America.
System Council No. 33 of International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers;
Protective Order of Dining Car Waiters and Attendants, Local No. 384 of Hotel and Restaurant Employees International Alliance, AF of L;
Local No. 383 of Hotel and Restaurant Employees International Alliance, AF of L;

On the Denver and Rio Grande Western Railroad.

[fols. 134-136] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 137] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION OF BROTHERHOOD COMMITTEES ON THE DENVER & RIO GRANDE WESTERN RAILROAD CO.,—Nov. 13, 1953

On this 13th day of November, 1953, at 4:04 o'clock, p.m., this cause comes on for hearing upon the motion under Rule 24 for leave to intervene, served and filed herein in behalf of the following Brotherhood Committees on The Denver and Rio Grande Western Railroad Company, to-wit:

General Committee of Adjustment of Brotherhood of Locomotive Engineers;
General Grievance Committee of Brotherhood of Locomotive Firemen and Enginemen;

General Committee of Adjustment of Order of Railway Conductors;
General Grievance Committee of Brotherhood of Railroad Trainmen;
General System Committee of American Train Dispatchers Association;
General Grievance Committee of Railroad Yardmasters of America;
General Committee of System Division 49 of Order of Railroad Telegraphers;
System Board of Adjustment of Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees;
General Committee of Brotherhood of Railroad Signalmen of America;
Mountain and Plains Federation of Brotherhood of Maintenance of Way Employees;
General Adjustment Committee of Switchman's Union of North America;
District No. 20 of International Association of Machinists;
District No. 22 of International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America;
[fols. 138-141] System Council No. 27 of International Brotherhood of Blacksmiths, Drop Forgers and Helpers;
District Council No. 10 of Sheet Metal Workers International Association;
System Council No. 21 of International Brotherhood of Electrical Workers;
Rio Grande-Western Pacific and Affiliated Lines Joint Protective Board of Brotherhood of Railway Carmen of America;
System Council No. 33 of International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers;
Protective Order of Dining Car Waiters and Attendants, Local No. 384 of Hotel and Restaurant Employees International Alliance, AF of L;
Local No. 383 of Hotel and Restaurant Employees International Alliance, AF of L;

and petitioners represent employees on The Denver and Rio Grande Western Railroad Company system.

On consideration whereof, the court finds that said motion for leave to intervene is well taken and should be granted and allowed.

It is, therefore, considered and ordered:

1. That said motion for leave to intervene be and it hereby is granted and allowed;

2. That the moving party be and he hereby is given and granted leave to intervene herein, and to serve and file appropriate pleadings in furtherance of his intervention;

3. That the clerk transmit forthwith copies of this order to counsel in the case.

By the Court: John W. Delehant, Judge, U.S. District Court.

[fol. 142] CLERK'S CERTIFICATE OF SERVICE OF ORDER OF INTERVENTION (omitted in printing)

[fol. 143] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

PETITION OF NATIONAL LIVE STOCK PRODUCERS ASSOCIATION FOR LEAVE TO INTERVENE—Filed Nov. 19, 1953

To the Honorable Judges of the United States District Court for the District of Nebraska, Omaha Division.

Comes now the National Live Stock Producers Association, and hereby moves the court for an order pursuant to Rules 24 (a) and (c) of the Federal Rules of Civil Procedure permitting petitioner to intervene as a defendant in the above-entitled proceeding.

I

That petitioner is a cooperative organization composed of over 500,000 live stock growers and feeders throughout

the live stock producing areas of the country, and twenty-two cooperative live stock associations, with its principal offices at 139 North Clark Street, Chicago 2, Illinois; it is initially interested in the sale, purchase and transportation of live stock in interstate commerce and has an important and pecuniary interest in the issues involved in the above proceeding.

[fol. 144]

II

That petitioner was an intervening complainant before the Interstate Commerce Commission in the proceeding in which the order of that Commission is here assailed, and therefore is authorized to intervene in this proceeding as of right under the provisions of Section 2323 of the Judicial Code, 28 U.S.C. 2323.

III

That petitioner will receive certain benefits from the order of the Interstate Commerce Commission in Docket No. 30297 (287 I.C.C. 611), wherein the Commission found (interalia) that through routes and joint rates are necessary and desirable in the public interest via Ogden or Salt Lake City, Utah, in connection with the Rio Grande, on ordinary live stock, in carloads, from origins in the Northwest to various destinations in the United States. The joint rates found necessary and desirable in the public interest are not to exceed the joint rates maintained on ordinary livestock from or to the same points over the Union Pacific routes.

IV

Accompanied herewith, pursuant to the provisions of Rule 24 (c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., is the answer of the petitioner, which answer sets forth the defense for which intervention is sought.

Wherefore, petitioner prays for an order granting it leave to intervene as a defendant in the above-entitled proceeding and to file the answer which is tendered herewith, with the right to have notice and to be treated in all other respects as if it had been named as defendant, and

for such other and further relief as the court shall determine.

Raymond E. McGrath, First National Bank Building, Omaha, Nebraska., Lee J. Quasey, Suite 1507, 139 N. Clark St., Chicago 2, Illinois., Attorneys for Petitioner.

[fol. 145] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ANSWER OF NATIONAL LIVE STOCK PRODUCERS ASSOCIATION, INTERVENING DEFENDANT.

Your petitioner, National Live Stock Producers Association, pursuant to leave granted by this court to become an intervening defendant herein, files this its answer to the complaint of the plaintiffs. The National Live Stock Producers Association now and at all times hereinafter saving and reserving to itself all rights and all manner of benefit and advantage of exception to the many errors and insufficiencies contained in the complaint, for answer thereunto or unto so much of such parts thereof as it is advised that it is material for it to answer, answers and says:

I

That petitioner will receive certain benefits from the order of the Interstate Commerce Commission in Docket No. 30297 (287 I.C.C. 611), wherein the Commission found (interalia) that through routes and joint rates are necessary and desirable in the public interest via Ogden or Salt Lake City, Utah, in connection with the Rio Grande, on ordinary live stock, in carloads, from origins in the North-
[fol. 146] west to various destinations in the United States. The joint rates found necessary and desirable in the public interest are not to exceed the joint rates maintained on ordinary live stock from or to the same points over the Union Pacific routes.

II

For its further answer and to avoid reiteration and repetition, petitioner, National Live Stock Producers Association, adopts as its own and as if pleaded herein the answer, together with the reservations in the answer, filed in this court by The Denver and Rio Grande Western Railroad Company, an intervening defendant herein.

Wherefore, having answered the allegations in the complaint, the petitioner, National Live Stock Producers Association, prays that the relief sought be denied, and that the complaint be dismissed with costs to the plaintiffs.

Raymond E. McGrath, First National Bank Building, Omaha, Nebraska., Lee J. Quasey, Suite 1507, 139 N. Clark St. Chicago 2, Illinois., Attorneys for Petitioner.

[fols. 147-149] CERTIFICATE OF SERVICE (omitted in printing)

[fols. 150-152] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION OF NATIONAL LIVE STOCK PRODUCERS ASSOCIATION—NOV. 23, 1953

On this 23rd day of November, 1953, at 10 o'clock, a.m., this cause comes on for hearing upon the motion under Rule 24 for leave to intervene, served and filed herein on behalf of the National Live Stock Producers Association, a cooperative organization composed of live stock growers and feeders throughout the live stock producing areas of the country and of cooperative live stock associations, with its principal offices at Chicago, Illinois.

On consideration whereof, the court finds that said motion for leave to intervene is well taken and should be granted and allowed.

It is, Therefore, Considered and Ordered:

1. That said action for leave to intervene be and it hereby is granted and allowed;

2. That the moving party be and he hereby is given and granted leave to intervene herein, and to serve and file appropriate pleadings in furtherance of his intervention;

3. That the clerk transmit forthwith copies of this order to counsel in the case.

By the Court: Harvey M. Johnsen, J. C. Collet, John W. Delehant.

[fol. 153] Clerk's Certificate of Service of Order of Intervention—(Omitted in printing)

[fol. 154] In the District Court of the United States for the Division of Nebraska, Omaha Division

Civil Action No. 76-53

Union Pacific Railroad Company, et al., Plaintiffs,

v.

United States of America and Interstate Commerce Commission, Defendants

Opinion—October 22, 1954

Messrs. Elmer B. Collins, Asst. Western General Counsel, John J. Burchell and W. R. Rouse, Of Counsel, Omaha, Nebraska, for Union Pacific Railroad Company.

Mr. F. O. Steadry, Chicago, Illinois, for Chicago and North Western Railway Company and Chicago, St. Paul, Minneapolis & Omaha Railway Company.

Mr. Carson L. Taylor, Chicago, Illinois, for Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

Mr. Eugene S. Davis, St. Louis, Missouri, for Wabash Railroad Company.

Messrs. Robert E. Quirk, Washington, D.C., Harry L.

Welch, Omaha, Nebraska, and Herbert M. Boyle, Denver, Colorado, for Denver & Rio Grande Western Railroad Company.

Mr. L. E. Torinus, Jr., St. Paul, Minnesota, for Great Northern Railway Company.

Mr. Bert L. Overcash, Lincoln, Nebraska (Mr. Clarence S. Beck, Attorney General of Nebraska, was on the brief) for the State of Nebraska and Nebraska State Railway Commission.

Mr. Robert L. Simpson, Olympia, Washington (Mr. Don Eastvold, Attorney General of Washington, was on the brief) for Washington Public Service Commission.

Mr. John H. Carkin, Salem, Oregon (Mr. C. W. Ferguson was with him on the brief) for Public Utilities Commission of Oregon.

Mr. John H. Riskin, Helena, Montana, for Board of Railroad Commissioners of the State of Montana.

Mr. Howard B. Black, Attorney General of Wyoming, Cheyenne, Wyoming, for State Board of Equalization and Public Service Commission of Wyoming.

[fol. 155] Mr. Justice R. Moll, Washington, D. C., and Messrs. J. D. Cranny and J. P. Moore, Omaha, Nebraska, for M. P. Caveny of Omaha, chairman of the Union Pacific General Chairmen's Association.

Mr. Ray McGrath for Idaho Farm Bureau, Public Service Commission of Utah, Committees of the Railroad Brotherhoods who work for the D& RG, and National Livestock Producers Association.

Messrs. Warren H. Ploeger and Roland J. Lehman, on the brief, Mesrs. Nye F. Morehouse, M. L. Countryman, Jr. Edwin C. Matthias, J. C. Gibson, M. E. Bluhm, Joseph H. Miller, Of Counsel, for the plaintiffs.

Mr. Edward M. Reidy, Chief Counsel, and Mr. Samuel R. Howell, Asst. Chief Counsel, Of Counsel, for Interstate Commerce Commission.

Mr. Henry B. Cockrum, Acting Assoc. Solicitor, United States Department of Agriculture, Washington, D.C.; Mr. Charles W. Buey, Assoc. Solicitor, was with him on the brief for the Department of Agriculture.

Mr. E. Riggs McConnell, Special Asst. to the Attorney General, Washington, D.C.; Messrs. Stanley N. Barnes,

Asst. Attorney General, James E. Kilday, Special Asst. to the Attorney General, and Donald R. Ross, United States Attorney, were with him on the brief for the United States.

Before JOHNSEN and COLLET, Circuit Judges, and DELEHANT, District Judge.

COLLET, Circuit Judge.

The Denver and Rio Grande Western Railroad Company, hereafter referred to as the Rio Grande, filed a complaint with the Interstate Commerce Commission requesting the Commission to order the Union Pacific Railroad Company (and other lines comprising the Union Pacific System, together with connecting carriers comprising, in all, 221 railroads, which will be referred to as the Union Pacific) to file joint rates over through routes with the Rio Grande for the transportation of freight from and to certain areas. The Commission granted the request as to certain types of freight with substantial territorial limitations. The Union Pacific *Union Pacific* brings this action [fol. 156] to enjoin and set aside the order. A reference to a map of the United States will be helpful in understanding the following summarization of the facts.

The northern terminus of the Rio Grande is Ogden, Utah. From Ogden it runs south through Salt Lake City and Provo, Utah, then southeasterly and east, entering Colorado at about the south central part of that state, thence east and somewhat north through the central part of Colorado to Dotsero, west of Denver, where it divides, one branch going on east to Denver, the other swinging south and east to Pueblo, Colorado. From Denver the Rio Grande line runs south through Colorado Springs to Pueblo and Trinidad. Other lines serve territory in southern Utah, northwestern New Mexico, and southern Colorado. These latter lines are not of special importance in this action. At Denver, Colorado Springs, Pueblo, and Trinidad the Rio Grande maintains joint rates and through routes with lines other than the Union Pacific to destinations east and south of those points.

The Union Pacific (including connecting lines which were defendants in the I.C.C. proceedings) serves the greater part of the east, south and midwestern sections of the United States. Traffic involved in this action from those

sections flowing westward over the Union Pacific and connecting lines converges at Denver and Cheyenne, Wyoming, then moves westwardly across the southern part of Wyoming to Ogden and Salt Lake City. One of its lines runs from Salt Lake City south to Provo, Utah, thence southwest to Los Angeles, California.

[fol. 157] The Union Pacific also serves the northwestern part of the United States, including that part of Utah north of Ogden, Montana, Oregon, and Washington. It is traffic from and to this latter territory, referred to herein as the northwest territory or area, which is the principal subject of the present controversy.

The Union Pacific maintains joint rates and through routes over its lines and with many connecting carriers from and to the northwest territory through Ogden and Salt Lake City, Cheyenne, Denver, and points east and south to the Atlantic Seaboard and the Gulf of Mexico. For a comparatively short distance, from Ogden through Salt Lake City to Provo, where the Los Angeles line swings southwest, the Union Pacific and the Rio Grande parallel and serve some common points. To and from these points, joint rates and through routes are maintained by the Union Pacific over its lines with the northwest territory and the area east of Cheyenne and Denver served by the Union Pacific. The Union Pacific does not maintain joint through rates with the Rio Grande, with certain exceptions not material in this proceeding. Freight moving from the northwest territory to points in southern Utah and Colorado on the Rio Grande, finally destined to points east of the eastern terminl of the Rio Grande, moves on the combination rate, consisting of the total of the Union Pacific rate to Ogden via Union Pacific and the Rio Grande rate from Ogden via Rio Grande to points on the Rio Grande. The same is true of the rates on shipments from points east of Denver to those points on the Rio Grande finally destined to the northwest territory. This combination of rates, or combination rate, as it is called, is considerably higher than a joint [fol. 158] through rate. Freight moving from and to the northwest territory from and to all points east of Denver [1]

[1] "All points east of Denver" will be used as the designation of all points included in the Commission's order to or

served by the Union Pacific and connecting carriers has the benefit of joint through rates via Union Pacific, with accompanying in-transit privileges en route, while freight originating on the Union Pacific in the northewest territory and moving to the area east of Denver, which is routed over the Rio Grande, pays the combination rate without in-transit privileges at points on the Rio Grande. The result is that practically all of the long-haul traffic originating in the northewest area and destined to the area east of [fol. 159] Denver goes over the Union Pacific all the way on the lower joint and through rates. Since the formal record before the Commission consists of 1,957 pages of

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from which through routes and joint rates were ordered established by the Union Pacific with the Rio Grande. The Commission's order in this respect was: (287 I.C.C. 611, 659)

"We conclude:

"1. That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads, from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area, as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, then immediately west of points on the Missouri River from Kansas City, Kans., to Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

testimony, 57 exhibits and 74 verified statements, the foregoing statement is obviously only a salient outline of the basis for the Rio Grande complaint. For a complete understanding of the intricacies of the case by one unfamiliar with the record, it will be necessary to refer to the extensive report and order of the Commission reported in 287 I.C.C. 611.

The Commission ordered the establishment of through routes and joint rates via Ogden or Salt Lake City by the Union Pacific with the Rio Grande for the transportation of granite and marble monuments in carloads from points of origin in Vermont and Georgia to destinations in the northwest area, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter and eggs, in carloads, from points of origin in the northwest territory to destinations "east of Denver." The order is based upon three primary basic findings. First, that the through routes and joint rates are necessary and desirable in the public interest, in order to provide *adequate and more economic transportation*; second, that the existing joint rates maintained by the Union Pacific are and will be *unjust and unreasonable and unduly prejudicial* to shippers and receivers of freight using or desiring to use the Rio Grande and *unduly preferential to shippers and receivers of freight using the Union Pacific*; third, that the maintenance by the Union Pacific of joint rates with the Bamberger Railroad between the northwest area and [fol. 160] points on the Bamberger line between Ogden and Salt Lake City, while refusing to establish joint rates with the Rio Grande to and from the same points on the Rio Grande between Ogden and Salt Lake City, subjects the Rio Grande to discrimination in violation of Sec. 3(4) of the Interstate Commerce Commission Act. Finding No. 1 has heretofore been quoted in footnote 1. Findings 2 and 3 are set out below.[2] To understand the import of these find-

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[2] "2. That the assailed rates on the commodities and from and to the points described in the foregoing finding are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferen-

ings it is necessary to explain the factual theory upon which they are based.

First as to the finding that the rates ordered are necessary and desirable to provide adequate and more economic transportation. Located along the route of the Rio Grande, between Ogden on the west and Denver, Pueblo and Trinidad on the eastern termini, are a number of livestock feeders. Some of these are ranchers who graze and feed cattle and sheep. Others are operators of beet sugar plants which produce livestock feed as a by-product and feed the by-product to livestock. These livestock feeders buy cattle and sheep in the northwest area, which are ultimately destined for the market, and ship them to points on the [fol. 161] Rio Grande for feeding. Many of the principal livestock markets of the United States are located east of privileges which would permit these livestock feeders to ship from the northwest area to the feeding points on the Rio Grande and then reship on joint through rates to points east of Denver, Pueblo, and Trinidad, they are at a substantial rate disadvantage with similar livestock feeders following the same practice who are located on the Union Pacific lines between Ogden and Provo, and between Ogden and Salt Lake City and Denver, located on the Union Pacific, who reship to points east of Denver. They are also at a substantial rate disadvantage in purchasing livestock in the northwest area in competition with buyers located on the Union Pacific lines west of Denver and Cheyenne who have the benefit of joint through rates and in-transit privileges over the Union Pacific.

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tial of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes.

"3. That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act."

287 I.C.C. 611, 659-660.

Also located on the Rio Grande are a number of industries which clean, package, process, freeze, and store fresh fruits, vegetables, poultry, food products, butter, eggs and beans, and ship them on east to points beyond Denver, Pueblo and Trinidad. These industries are at a comparable rate disadvantage, without in-transit privileges, as livestock feeders, and for the same reasons.

Monument dealers obtaining or shipping granite and marble from Vermont and Georgia are unable to ship full carloads to the northwest territory and have the rate advantage of partially unloading cars at intermediate points on the Rio Grande under in-transit privileges of through routes [fol. 162] and joint rates which are available at points located on the Union Pacific.

This finding, which is finding No. 1 quoted in the footnote, is held by the Commission to justify ordering the establishment of through routes and joint rates under Secs. 15 (3) and 15 (4). Title 49 U.S.C.A. Secs. 15 (3) and 15 (4). Sec. 15(3) empowers the Commission to establish through routes and joint rates when necessary or desirable in the public interest,[3] but Sec. 15 (4) prohibits the Commission from ordering the establishment of through routes by a carrier under Sec. 15 (3) without the carrier's consent if the result would be to short-haul that carrier unless, as provided by Sec. 15 (4), the Commission finds that the through route is needed in order to provide (1) *adequate*, and (2) *more efficient* or *more economic* transportation.[4]

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[3] "Sec. 15 (3) The Commission may, and it shall whenever, deemed by it to be necessary or desirable in the public interest, * * * establish through routes, * * * and joint rates, * * * applicable to the transportation of * * * property by carriers subject to this part, * * *."

[4] "Sec. 15 (4) In establishing any such through route the Commission shall not * * * require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, * * * (b) unless the Commission finds that the through route

[fol. 163] The Commission accurately states the legal effect of Sec. 15 (4) in its report (Denver & R.G.W. R. Co. v. Union Pac. R. Co., 287 I.C.C. 611) at page 655 as follows:

"Since the two decisions last above referred to, section 15 (4) has been amended (in 1940), so that now the prohibition against short hauling is subject, not only to the exception that such inclusion of lines must not make the through route unreasonably long as compared with another practicable through route which could otherwise be established, but to the additional exception that the short-hauling provision may be disregarded where the 'through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation.' Thus, where as here we are asked to disregard the short-hauling provision, we must give consideration, first, to the adequacy of the transportation, and second, to the efficiency and economy of the transportation. In Pennsylvania R. Co. v. United States, 323 U. S. 588, which affirmed the judgment of a lower court sustaining an order of division 2 in D. A. Stickell & Sons, Inc., v. Alton R. Co., supra, the supreme Court said that the expressions 'more efficient or more economic transportation, as used in section 15 (4), 'may well embrace both shippers' and carriers' interests, * * * that both interests should be considered and a fair balance found.' These latter considerations are not determinative, however, unless the existing routes can be found not to provide 'adequate' transportation.

"In the proceeding just mentioned, the Supreme

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proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs, * * *"

Court said that adequacy of transportation relates only to the interest of the shipping public, whereas, as above stated, efficient and economic transportation embraces both shipper and carrier interests."

Was there evidence to support the finding of inadequacy? Only in the event there was inadequacy of transportation can the question of efficiency or economy be reached. It is clear from the report and the evidence that the finding of inadequacy is based upon the lack of in-transit privileges by shippers and receivers located on the Rio Grande as to the commodities embraced in the order. There is no evidence to support a finding that the physical transportation facilities furnished by the Union Pacific between the northwest area, on the one hand, and points east of Denver are [fol. 164] inadequate. There is abundant support, however, for the finding that the service is inadequate to patrons of the Rio Grande, located on the Rio Grande between Ogden on the west and Denver, Pueblo, and Trinidad on the east (not served by the Union Pacific between Ogden and Provo), who do not have in-transit privileges with respect to freight moving from the northwest area which is to be reshipped to points east of Denver, if under the law the lack of in-transit privileges may constitute "inadequacy." That is also true as to the service to shippers of marble and granite from Vermont and Georgia to initial points on the Rio Grande who need the in-transit privileges of partial unloading or processing en route, incident to reshipment to final destination points beyond Ogden in the northwest area. The foregoing inadequacies are based upon the premise that the lack of in-transit privileges constitutes inadequacy of service within the meaning of clause (b) of Sec. 15 (4). The Union Pacific vigorously contends that it does not. This question presents the crux of this case. If, as the Union Pacific contends, in-transit rights and privileges are matters over which the Commission under the law has no control, the existence or granting of which is subject only to managerial discretion of the carrier, and relate only to economy or efficiency of transportation to the exclusion of considerations of adequacy of transportation, then the lack of in-transit privileges will not suffice as a proper basis

for ordering "adequate" transportation. The argument is made to effect that since the transportation facilities are now available over the Union Pacific and the Rio Grande on the higher combination rates, the present nonexistence of in-transit privileges relates only to the cost or economy [fol. 165] of transportation. Reference is made to excerpts from opinions which it is said support the conclusion that the Commission may not under its general regulatory power force a carrier to provide or establish in-transit privileges. The question has many ramifications. We are confronted only with determining whether a finding of inadequacy of transportation may be legally based upon the absence or lack of services which are incidents of and to in-transit privileges. If that be true, the Commission may order the establishment of through routes and joint rates, with their ordinary incidents—in-transit privileges—when such action is necessary in order to provide adequate transportation. We are convinced that the Commission does have that power. Pennsylvania R. Co., et al. v. United States, et al., 323 U. S. 588, 54 F. Supp. 381.

But the inadequacy established by the evidence does not extend to shipments from the northwest area to initial destinations east of Denver. The same is true of shipments of monuments from Vermont and Georgia to points of initial destination in the northwest territory. Transportation service is now adequate between those points. There is ample evidence to support the finding that the establishment of the through routes and joint rates between the northwest area and points on the Rio Grande (not also served by the Union Pacific between Ogden and Provo), as to shipments which require in-transit privileges at points on the Rio Grande for reshipment to points east of Denver, will result in more economical transportation. Differences in mileage and other comparative factors are for the Commission to weigh, evaluate and determine. Its ultimate factual conclusion may not be overturned when supported by the [fol. 166] evidence. But, again, there is no evidence that the service is inadequate or that more economical transportation service will result with respect to shipments from the northwest area to points between Odgen and Provo served by both the Union Pacific and the Rio Grande and to be

reshipped to final points of destination east of Denver. The transportation facilities are shown by the evidence now to be adequate, with in-transit privileges between those points over the Union Pacific. And that service is as economical via the Union Pacific as it would be over the Union Pacific and the Rio Grande if the through route and joint rates were established. The evidence therefore sustains the finding of inadequacy and the need for more economical transportation only as to (1) carload shipments of commodities embraced in the Commission's order from points in the northwest territory destined to points of final destination east of Denver which require in-transit privileges at points on the Rio Grande; (2) shipments of granite and marble monuments from Vermont and Georgia to final destinations in the northwest territory which require in-transit privileges at points on the Rio Grande not also served by the Union Pacific. If the order had been so limited to the evidence it would eliminate short-hauling the Union Pacific except as to shipments requiring service which is now inadequate and which service the Union Pacific cannot now give. It would eliminate the charge made by the Union Pacific that the order was for the purpose of assisting the Rio Grande to meet its financial needs, and, more important, it would have rested squarely within the authority of clause (b) of Sec. 15 (4).

[fol. 167] The second finding, that the combination rates maintained by the Union Pacific and the Rio Grande are unduly prejudicial to shippers using or desiring to use the Rio Grande and unduly preferential to shippers and receivers using the Union Pacific to the extent they exceed the joint and through rates available to shippers located on the Union Pacific, is made for the purpose of bringing the order within the authorization of Sec. 3(1). Title 49 U.S.C.A. Sec. 3 (1). That section is as follows:

> "Sec. 3 (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect

whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

The situation which this finding seeks to correct, simply stated, is that the shippers and receivers of the designated commodities located on the Rio Grande who do not have in-transit privileges and joint and through rates are at an economic disadvantage compared to shippers and receivers located on the route of the Union Pacific who do have joint and through rates and in-transit privileges.

If the prejudice and preference shown by the evidence falls within the prohibition of Sec. 3 (1) the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15 (3) and 15 (4) heretofore considered. But the prejudice and preference pro-
[fol. 168] hibited by Sec. 3 (1) relate to prejudice and preference shown by one carrier or a combination of carriers between the entities named in 3 (1) which are served by the one carrier or the combination acting as one. The prohibition of Sec. 3 (1) is intended to prevent a carrier from giving preferences or advantages, over which the carrier has control, to one of the entities named and not to another. It does not apply to a situation such as this, where the comparison of preferences and advantages or prejudices and disadvantages is between the entities named when they are located on the lines of different carriers not acting in concert or collusion. Although the factual situation in Central R. Co. of New Jersey v. United States, 257 U.S. 247, was different, the purpose of Sec. 3 (1) was there stated as follows: (Loc. cit. 259-260)

"What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same

carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, c. 91, 41 Stat. 456, nor any earlier amendatory legislation has changed, in this respect, the purpose or scope of § 3."

If the Commission could order through routes and joint rates between two or more competing railroads under Sec. 3 (1) merely because a shipper entity described in Sec. 3 (1) located on one railroad had a transportation advantage over such an entity located on the other railroad, the prohibition of Sec. 15 (4) would be practically emasculated. The evidence of preference, advantage, prejudice or disadvantage, under these circumstances, furnishes no basis for the order under Sec. 3 (1).

The third finding, heretofore quoted, to the effect that the maintenance by the Union Pacific of joint rates with the Bamberger Railroad to and from points in the north- [fol. 169] west area and points on the Bamberger line from Ogden to Salt Lake City, inclusive, while refusing to maintain joint rates with the Rio Grande on shipments from the northwest area to the points served by both the Rio Grande and the Bamberger Railroad from Ogden to Salt Lake City, inclusive, discriminates against the Rio Grande, is based on Sec. 3 (4), which is as follows:

"Sec. 3 (4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

The Bamberger Railroad is an electric line operating only from Ogden to Salt Lake City, serving those cities and

intermediate points. The Rio Grande serves all points served by the Bamberger. The criterion for determining unlawful discrimination under Sec. 3 (4) is stated by the Commission at page 658 of its order as follows:

> "A finding of discrimination under section 3 (4) of the act must be supported by a showing that the transportation conditions are no less favorable over the routes alleged to be discriminated against than over the routes said to be preferred."

The Commission found there was no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande. Upon this record that factual conclusion may not be disturbed. Section 3 (4) clearly prohibits such discrimination. The Commission's order in this respect is valid under Sec. 3 (4).

[fol. 170] Considerable attention has been given by the Union Pacific in its brief to the action of the Commission in rejecting a portion of evidence offered by it in an attempt to show improper conduct in the preparation and presentation of the Rio Grande's case before the Commission. We do not find justification for serious consideration of that question.

Findings of Fact

I

The finding of the Commission that present transportation facilities between the northwest area and points of initial destination east of Denver are inadequate is not supported by the evidence, because present transportation facilities over the Union Pacific between such points are adequate. And the evidence shows that the establishment of joint rates and through service via the Union Pacific and the Rio Grande between the northwest area and points of initial destination east of Denver, Pueblo, and Trinidad would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points.

II

The record supports the Commission's finding that present transportation service between the northwest area and points of initial destination on the Rio Grande (not also served by the Union Pacific) between Ogden and Provo) is inadequate and also inefficient and uneconomical as to shipments of the commodities specified by the Commission from [fol. 171] the northwest area to initial points of destination on the Rio Grande west of Denver, which require in-transit privileges enabling their reshipment on joint through rates to points of final destination east of Denver.

III

The record supports the Commission's finding that present transportation service for granite and marble monuments, in carloads, originating in Vermont and Georgia, consigned to initial destination points on the Rio Grande, requiring unloading and in-transit privileges for continued movement to points in the northwest territory, is inadequate and uneconomical and that the establishment of joint rates and through service is necessary in order to provide adequate and more economic transportation for such shipments.

IV

The evidence supports the finding that as to designated items of traffic moving from the northwest area, shippers and receivers of freight located on the Rio Grande are at an economic disadvantage compared with shippers and receivers of freight from the northwest area who are located on the Union Pacific. But there is no community of interest between the Union Pacific and the Rio Grande and hence there is no discrimination by the Union Pacific within the prohibition of Sec. 3 (1).

V

The evidence supports the finding of the Commission, referred to and quoted herein as Finding 3, that unlawful discrimination prohibited by Sec. 3 (4) is being practiced by the Union Pacific in refusing to establish through routes [fol. 172] and joint rates with the Rio Grande comparable to those existing between the Union Pacific and the Bam-

berger Line on traffic moving from the northwest area to points served by both the Bamberger Line and the Rio Grande between Ogden and Salt Lake City.

Conclusions of Law

I

The absence of in-transit and other privileges involved herein, incident to through joint rates will, under the law, support a finding that transportation service without such services and privileges is inadequate within the meaning of Sec. 15 (4). The evidence therefore supports the finding of the Commission that the establishment of through routes and joint rates between the Union Pacific and the Rio Grande is necessary in order to provide adequate and more economic transportation of the designated commodities in carloads originating in the northwest area, consigned to initial destination points on the Rio Grande west of Denver, Pueblo and Trinidad, which require in-transit privileges incident to reshipment to points east of Denver, Pueblo and Trinidad. As to such commodities the order of the Commission is valid under Secs. 1, 15 (3) and 15 (4) of the Act and does not violate the direction of Sec. 15 (4) that reasonable preference be given the carrier which originates the traffic.

II

The evidence supports the finding of the Commission that it is necessary, in order to provide adequate and more economic transportation of shipments of marble and granite monuments in carloads from points in Vermont and Georgia [fol. 173] to points of final destination in the northwest territory, which require unloading and in-transit privileges at points on the Rio Grande incident to the continuation of the shipment to the northwest area, that through routes and joint rates be established between the Union Pacific and the Rio Grande as to such shipments.

III

To the extent that the order of the Commission requires the establishment of through routes and joint rates between

the Union Pacific and the Rio Grande on carload traffic moving from the northwest area to points on the Rio Grande, which traffic is to be reshipped to points east of Denver, but which is of such nature or character that it does not require stoppage-in-transit privileges, which are incident to in-transit privileges, and as to all traffic moving from the northwest area to points of original destination east of Denver, Pueblo or Trinidad, said order is not valid, because Sec. 15 (4) constitutes a limitation on the power of the Commission to order establishment of through routes which will result in short-hauling the Union Pacific, unless that be necessary in order to provide, inter alia, adequate transportation. Since the evidence does not justify a finding of fact that the establishment of such routes and rates is necessary to provide adequate transportation for commodities of the character stated or to the destinations specified in this paragraph, that factual premise, essential to the validity of the order, is lacking.

[fol. 174]

IV

To the extent the Commission requires the establishment of through routes and joint rates between the Union Pacific and the Rio Grande at Ogden on carload traffic moving from the northwest area to points between Ogden and Salt Lake City, inclusive, served by both the Rio Grande and the Bamberger Line, the order is valid for the purpose of removing an unlawful discrimination against the Rio Grande under Sec. 3 (4) of the Act.

To the extent stated in the foregoing opinion, findings of fact, and conclusions of law, the order of the Commission will be enjoined. The cause is remanded to the Interstate Commerce Commission for such further proceedings as it may deem appropriate, consistent herewith.

[File endorsement omitted.]

[fol. 175] Civil Action No. 76-53

UNION PACIFIC R. CO.

vs.

UNITED STATES

JOHNSEN, Circuit Judge, dissenting:

The Commission has here used standards and criteria for the exercise of its power to compel through routes and joint rates, which I think are beyond the warrant of the statute. The majority opinion upholds in part the result which the Commission has so reached.

What the Commission purports to make the primary basis for its establishing of through routes and joint rates over the Rio Grande is "perishable food articles". Here, as taken from its Report, are the manner and perspective of its approach to the question.

"Growers [of perishable food articles in Idaho, located on the Union Pacific] * * * market such products throughout the United States. In order to get as wide a distribution as possible, those growers and other growers in the northwestern area [that part of Utah lying north of Ogden, and the States of Idaho, Montana, Oregon and Washington] need as many markets and outlets as possible."[1] 287 I.C.C. at page 642. To comprehend or evaluate that need, says the Commission, "it is necessary to consider the nature, extent and functioning of our intricate and far-flung commodity marketing system." P. 655. The

[1] It should be noted that the situation covered by the Commission's order does not involve the matter of joint rates to intermediate points on the Rio Grande as final destinations. Joint rates already apply to such traffic. The question is one of through routes and joint rates for traffic having a billing origin and destination outside of Rio Grande territory, and for which the Rio Grande therefore would merely be serving as a "bridge" line only, while the Union Pacific, on whose branch lines most of the traffic originates, would be caused to lose a line-haul thereon of 975 miles.

importance, in our condition of growing population and national development, of having "a constantly expanding flow of diverse commodities" and "particularly articles of [fol. 176] food" is emphasized. The comment is made that "A complex but efficient marketing system has been evolved to provide as orderly a distribution of food commodities as possible," and the truism is expressed that "Adequate transportation facilities and services are required for the proper functioning of the system." P. 656.

Then follows what seems to me to represent the crux of the Commission's concept and standard in what it did.

1. "Because of their generally perishable nature, food articles, such as fresh fruits and vegetables, frozen poultry, frozen foods, butter, eggs, ordinary livestock, and dried beans, must be moved to market with expedition and care, and *over as many routes as possible*. This requires that many routes be open in order that unnecessary interruptions of the free flow of such commodities may be avoided and that *as much flexibility as possible in the distribution process be permitted*." (Emphasis mine.) P. 656.

2. "A number of services, not only at origin and destination, but enroute, which are not usually required in the movement of ordinary traffic, must be provided for these perishable and semiperishable commodities." In-transit privileges, "such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit," are available at various points on the Union Pacific to through-shippers, on the basis of the joint rates applicable over that route, and similar privileges exercisable on the Rio Grande could be made available to such shippers, at a lower cost than under the present combination rates, by establishing competitive through routes and joint rates over that road, so that those desiring to have the benefit of these additional facilities would be able to enjoy them on the same basis as those on the Union Pacific. Because the use of such transit facilities on the Rio Grande are not available in the same manner as those on the Union [fol. 177] Pacific, "The shippers in the originating area involved in this complaint with respect to these commodities are debarred from effective participation in the wide-

spread system developed for the marketing of such commodities." P. 656.

3. The Commission does not attempt to explain how the failure of such through-shippers as a general class to have access to the transit privileges on the Rio Grande on the same rate basis as on the Union Pacific, can thus broadly and absolutely be declared to debar them "from effective participation in the widespread system developed for the marketing of such commodities." In the absence of such an explanation, and on the implication of what the Commission has precedingly said in its Report, as set out above, the only deduction that I am able to make is that the Commission regards all shippers of perishable commodities as having a right generally or abstractly, upon an expressed desire by any of them in a particular situation, to be given "as many routes as possible" and "as much flexibility as possible in the distribution process", because otherwise they will be "debarred from effective participation in * * * the marketing of such commodities."

In other words, whenever it is possible physically and practicably to open up a new or an additional through route for such commodities, the Commission apparently feels entitled to exercise its power to do so, in order to make available any increase in the amount of transit privileges en route which can be provided for such through-traffic, on the basis of simply declaring, as it in effect did here, that the previous through routes are inadequate, since they lack the additional transit privileges of the new carrier's route, which some shipper may desire or can solicitedly be persuaded to use, and on the basis of further holding that the other prerequisite of section 15 (4) of the Act, 49 U.S.C.A. § 15 (4), where the element of short-hauling another carrier is involved, as it is here, that such [fol. 178] an added through-route must also provide "more efficient or more economic transportation" than that existing on the present through routes, can sufficiently be satisfied by merely resorting to the Commission's power under section 15 (3) to prescribe joint rates and pointing out that joint rates necessarily in the situation will provide "more economic transportation", since they obviously are lower than the previous combination rates.

I have grave legal doubt whether the Commission's power to establish joint rates under section 15 (3) has any relationship to the term "more economic transportation" in section 15 (4), dealing with the Commission's right to open up through routes. Rather, it seems to me that the term "more economic transportation" in section 15 (4) is intended to have reference to the elements of distance, time, equipment, cost of operation, territorial reach, and all those other quantitative and qualitative factors which are inherent in a transportational comparison from the standpoint of the interests of both the public and the carriers—and that the Commission's power to establish joint rates under section 15 (3) is one which has application only after through routes exist or are established, without the right to use it as a factor under section 15 (4) for satisfying the requirements of opening up a long-haul-depriving, additional through route.

But however this may be, I am at least convinced that, where the question is one, as here, of opening up, not an initial through route, but an additional one for the same through-traffic to the same ultimate destinations, the Commission's power to establish joint rates cannot be made to constitute the sole ingredient or content of the term "more economic transportation" under section 15 (4), in the addition of another carrier's route as a mere "bridge" line for such traffic. If that be not so, then there is not any situa-[fol. 179] tion in which the Commission can not make a finding of "more economic transportation" for whatever additional through route it may undertake to open up, since in all cases joint rates necessarily, from their very nature, are lower than combination rates otherwise applying.

Let me add in summary that, if it can properly be held, as the Commission has done here, that perishable commodities are entitled to "as many routes as possible" and "as much flexibility as possible in the distribution process," so that on this basis, and without regard to any other factor, any existing through route can be called inadequate, because it is possible to create additional transit privileges or facilities for such traffic by opening up another through route over another railroad, serving as a bridge line, and further such new route can be declared to provide "more

economic transportation", because by placing joint rates in effect, the cost of using such new through route for its transit facilities will be less than under the general combination rates previously existing, then the railroads of the country may as well forget section 15 (4) entirely as affording them any protection whatsoever against deprivation of their long hauls.

Here the opening up of a through route over the Rio Grande as a bridge carrier for the transcontinental freight involved will deprive the Union Pacific of a long haul of 975 miles upon such traffic as the Rio Grande is able to solicit away from it. But this is not the sole purport or effect of the Commission's order. If the order is upheld either in whole or in part, on the basis on which the Commission's result has been reached, the Commission can hereafter exercise its power to require through routes and joint rates from every connecting point in the country against every existing carrier, since every new through route necessarily will afford additional transit privileges and every joint rate necessarily will reduce the cost of using the new through route as against the combination rate previously applicable.

[fol. 180] Nor should one allow oneself to be blinded to what the real scope and significance of the Commission's reach here is. What it has purported to paint the picture of, in relation to its standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" is, as previously indicated, "perishable food articles". But it has, by means of some artificial classification, included ordinary livestock as a perishable food article (P. 656), saying merely, before doing so, that "We think, however, that the situation here as to livestock is no different from that portrayed as to certain other commodities with respect to the need for competitive routes over the Rio Grande via the Ogden gateway.". And it has further held that a little monument dealer, located on the Union Pacific in Utah, is entitled to have established for him a through route and joint rates on the Rio Grande, in order to have the transit privilege available to him of unloading locally, here and there in Colorado, on a through

rate basis, some individual monuments out of an estimated four-carload lot of monuments per year.[2]

All of this to me is but another attempt by the Commission to gain a new foothold, under another disguise, for the philosophy and position that it should have the right to put into effect as many new through routes as it deems advisable, without being required to give consideration to the question of short hauling another carrier. It has repeatedly asserted that viewpoint and sought to gain that [fol. 181] end. But Congress has never been willing to accede to that philosophy and position, and the courts have on a number of occasions had to strike down the Commission's efforts in that direction. All this is familiar history in the railroad world, and I shall not bother to go into it further here.

It is on the basis of the unqualified use of that standard here in relation to perishable commodities, and the attempt to get the camel's nose under the tent as to one or two other commodities also, in a smothered, beginning approach to an apparently wider future reach, that I would strike down the Commission's order. I think that anyone who reads the Commission's Report, in the light of what I have said, and stripped of all the confusion in which the

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[2] I shall not take the time to go into the details of this trivial monument situation, which the Commission characterized as one of "urgent need" (Page 638), except to comment that it is typical of the Commission's approach, result and intended reach. Why a little dealer, who wants to make local peddlings of 4 carloads of tombstones is entitled to have the Union Pacific join in giving him the opportunity to do so on a through rate basis is a bit beyond me. But more than this, if tombstones constitute a commodity that is entitled to this extreme transit privilege, on the same basis as perishable foods, then the Commission's purported basis of "as many routes as possible" and "as much flexibility as possible in the distribution process" for perishable foods is meaningless, and it seems rather apparent what this initial action of the Commission here portends for the transportation system generally of the country.

Report has been wrapped, will have no convictional difficulty as to the implications which I have pointed out.

I do not mean to make any implication, nor do I here assume to pass judgment, on whether the Ogden gateway is in other manner or to other extent subject to being opened up. All I say is that the philosophy and standard of "as many routes as possible" and "as much flexibility as possible in the distribution process" can not be made the basis for overriding the short-hauling provisions of section 15 (4), through the merry-go-round device of calling all transportation inadequate without the availability of every bit of transit privilege that exists on any connecting carriers aggregately, and of construing the term "more economic transportation" to mean nothing more than the difference between joint rates placed in effect and the combination rates previously existing.

The philos-phy and standard which the Commission has used are unquestionably sound as a marketing principle, but the railroad transportation system of the country has never yet been relegated by Congress to the full impact of [fol. 182] marketing principles alone. There is not a distributor of any commodity—including perishable foods—who, up to the time at least of the Commission's present order, has had, or has been regarded as being entitled to have, as a matter of sound transportational concept, every avenue and facility that it is possible to open up for him, with a simple brushing aside of transportational conditions, realities and consequences, such as I think the Commission here did.

I have previously referred to the fact that most of the traffic that is here involved originates on the branch lines of the Union Pacific, and that on such of this traffic as the Rio Grande is able to solicit to use its route, the Union Pacific will lose a line haul of 975 miles. The Report of the Commission admits that "the extent to which the Union Pacific route is shorter than the route sought by the Rio Grande to and from points between which most of the traffic here concerned moves" is about 200 miles. Page 654. It also recognizes that the Rio Grande is a mountainous route, of higher grades, more circuity, and greater operational costs than the Union Pacific. "The total rise and fall in

feet on the Rio Grande is 66.3 per cent greater than that of the Union Pacific. Other data as to physical characteristics of the two lines show that the Rio Grande line is less favorably situated than that of the Union Pacific. Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services." Page 648.

All of these matters, however, the Commission lightly brushes aside, as not having relationship to the question of "more economic transportation" in the situation, and so leaving it free to hold, as above indicated, that the new through route provides "more economic transportation", because its joint rates necessarily are lower than the previously applicable combination rates. All that the Commis- [fol. 183] sion says, in brushing aside the transportational differences which I have set out, as not requiring consideration on the question of "more economic transportation" in the situation, is that, when they are spread over hauls of such great lengths as are here involved, "they become relatively insignificant." Page 658.

The Report does not undertake to show what amount of traffic goes where. It merely says that "About 90 per cent of the traffic upon which joint rates are sought via Ogden and the Rio Grande moves to (Missouri River crossings and points east and southeast) and about 10 per cent to the Southwest." Page 626. How much terminates at the Missouri River crossing-points or at other midwestern destinations, the Report does not state. As to livestock, however, it certainly is a matter of common knowledge that the primary markets are Chicago, Omaha, Kansas City and some other Missouri River points. To each of these points, as well as to the Minneapolis and St. Louis markets, the record shows that a haul of 200 miles more, and a transportation time of at least 24 hours longer, as well as at least one or two more terminal-yard services, are involved over the Rio Grande route. I do not believe that without rational demonstration the Commission can say, except arbitrarily, that in relation to hauling distances of 1036 miles (Omaha) or 1153 miles (Kansas City) or 1524 miles (Chicago), the elements of difference which I have set out

are so "relatively insignificant" as to be entitled to be ignored on the question of whether "more economic transportation" is being provided. And in the absence also of some demonstration or analysis of quantities and destinations as to the various other commodities involved, I do not believe that the Commission can be said to have any less arbitrarily brushed off the facts of the transportational and service differences existing, as related to the question of "more economic transportation" under the statute, than in the case of livestock, when it merely attempts to push all of the facts abstractly to a far-distant horizon, without [fol. 184] establishment of the reality of that horizon for lumping purposes.

Incidentally, I also may add that what the Commission has here done as to livestock is a departure or exception from the long-established general livestock scheme, practice and policy which the Commission has previously recognized and accepted. In *Livestock, Western District Rates*, 176 I.C.C. 1, 190 I.C.C. 675, 190 I.C.C. 611, 200 I.C.C. 535, the Commission prescribed rates on livestock in western territory, predicated generally on the shortest routes over which carload traffic could be moved without transfer of lading, but the carriers were not required to maintain the rates over such routes where it would result in short hauling within the meaning of section 15 (4) of the statute. In establishing the prescribed rates, the carriers limited their application, as the Commission itself has recognized, over routes which did not result in short hauling, and over other and longer routes provided higher rates, either by the addition of arbitraries or the application of the mileage scales over the longer routes, giving consideration to the distance involved. This the Union Pacific was willing to do in relation to the Rio Grande's route. It would seem to me that the upsetting of this general, established scheme, practice and policy as to livestock rates, in the present situation, apart from the other aspects of the question here involved as to the livestock, is entitled to some explanation on the part of the Commission, if it is to escape the implication of an arbitrary departure as against the Union Pacific in its long-hauling of livestock from the northwest territory, as related to the differential permitted to be created by other carriers generally in such situations.

This dissent is being written hastily, in order not to delay the filing of the majority opinion, and I shall accordingly not take the time to go into detail on other matters. I [fol. 185] agree with the majority that the Commission had no right here to find a violation of section 3 (1) of the Act against the Union Pacific and its connecting through-route carriers, but the basis for my view is not that adopted by the majority, that a discrimination under this section cannot at all exist, unless the complaining person or entity is located upon the lines of the carrier or combination of carriers claimed to have committed the discrimination. I do not believe that this viewpoint is tenable on the language of section 3 (1), nor on the expressions contained in St. Louis Southwestern Ry. Co. v. United States, 245 U.S. 136, 144, as well as on the plain, contrary assumptions made in Texas & Pacific Ry. Co. v. United States, 289 U.S. 627. But on the factual elements that are involved in the present situation I do however not think that there exists any basis on which to declare the Union Pacific and its connecting through-route carriers guilty of unreasonable preference or unreasonable prejudice under section 3 (1), in having refused to join with the Rio Grande to make the latter available as a bridge line for hauling through traffic at the same rate, over a 200-mile longer route, with a 66.3 per cent greater variation in grade, involving a 24-hour additional hauling time, and necessitating the furnishing of several more terminal-yard services. I do not believe that these facial railroad realities would permit of a finding of such a discrimination as was intended to be reached by section 3 (1). If the Commission had attempted to predicate the relief which it here granted upon the existence of a violation of section 3 (1), I am certain that its action resting on this basis alone could not on these facial realities be upheld. Only an escape from these facial realities, through a dissolution of them under the considerations open to the Commission in section 15 (4), such as the Commission here attempted, could at all, in my opinion, on the facts of the situation, have furnished a basis for the prescribing of through routes and joint rates in relation to the existing conditions.

[fol. 186] In the pattern of the Commission's apparent

attempt to strike at as much in the present situation as possible, the Commission further, as noted in the majority opinion, required the Union Pacific to establish joint rates with the Rio Grande to and from the same points where it maintained joint rates with the Bamberger Railroad. The Report says: "The Bamberger operates, for about 36 miles, between Ogden and Salt Lake City, and it appears that there is no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande." P. 659. The brief of the Union Pacific argues pointedly that "No evidence was submitted concerning or comparing transportation conditions on the Bamberger's electric line, between Ogden and Salt Lake City with conditions on the Rio Grande." The brief of the Commission makes no denial of the fact that no such evidence is contained in the record. The most that the Commission could properly have said, I think, was that it had not been made to appear by the evidence that there was any important dissimilarity in the conditions on the two roads. But the lack of any such evidence of dissimilarity could hardly afford a basis for a finding of similarity on the part of the Commisssion. This segment of the Commission's order is perhaps of relatively small importance in the present controversy. I refer to it simply as being characteristic or in the pattern of the loose and improper basis and manner in which it seems to me that the Commission has dealt with the entire situation.

I would strike down the Commission's order generally, on the basis and manner in which its result has been reached. In taking that position, however, I would again emphasize that I intend no implication that there may not exist some proper basis and some proper manner of reach as to some part of the Ogden gateway situation. I have not allowed my mind to look at that avenue, in either one direction or [fol. 187] the other. The pervading infirmities on which the Commission's present order seems to me to rest make it sufficient and compel me to halt my judicial consideration right there.

[File endorsement omitted.]

[fol. 188] Clerk's Certificate of Service of Opinion (Omitted in printing)

[fol. 189] [File endorsement omitted]

In the District Court of the United States for the District of Nebraska, Omaha Division

[Title omitted]

Motion of Intervening Defendant Denver and Rio Grande Western Railroad Company for New Trial—Filed November 1, 1954

Comes now the intervening defendant Denver and Rio Grande Western Railroad Company, and moves the Court to grant a new trial herein, or in the alternative to permit reargument of the above cause for the reasons that the Court erred in making certain findings of fact and certain conclusions of law, and erred in failing to sustain the decision of the Interstate Commerce Commission in its entirety insofar as it is attacked herein by the Union Pacific Railroad Company and other intervening plaintiffs.

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Herbert M. Boyle, The Denver and Rio Grande Western Railroad Company, 1531 Stout Street, Denver Colorado. Robert E. Quirk, 1116 Investment Building, Washington 5, D. C., Of Counsel.

[fol. 190] Certificate of Service (Omitted in Printing)

[fol. 191] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

MOTION OF PLAINTIFFS AND INTERVENING PLAINTIFFS FOR A NEW TRIAL OR REARGUMENT AND RECONSIDERATION—Filed November 12, 1954

Plaintiffs, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, and intervening plaintiffs, Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, move the Court, pursuant to Federal Rules of Civil Procedure, 28 U.S.C.A., Rule 59, to grant a new trial in the above-entitled cause, or in the alternative to permit reargument, and to reconsider this cause, for the reason that the majority opinion filed herein by the Court October 22, 1954 contains certain erroneous statements of fact which are vital to the conclusions reached, contains numerous errors of law, and also errs in failing to hold that the order of the Interstate Commerce Commission is null and void and should be enjoined in its entirety for the numerous reasons urged by plaintiffs and intervening plaintiffs.

[fol. 192] More specifically, these Movants respectfully urge in support of this motion that the majority opinion is erroneous in the following particulars:

I

The majority opinion errs in holding that the evidence of record supports the Commission's order to the extent indicated in the opinion, and the opinion clearly discloses that the majority has erred in failing to consider the whole record of evidence and the issues tendered herein, as required by the Administrative Procedure Act and the law of judicial review laid down by the Supreme Court of the United States. *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474, 487-488.

II

Although the majority opinion holds the order valid to the extent indicated therein, solely upon the belief that there are no transit privileges available for the involved traffic at points on the Rio Grande and that the absence of those privileges on the Rio Grande may be made the basis of a lawful order requiring the Union Pacific to short haul itself by making through routes and joint rates with the Rio Grande, the majority has erred in failing to consider and decide whether any of the numerous other grounds urged by these Movants render the order invalid in its entirety.

III

Upon its holding (page 10) that the Commission premised its order on its finding that Union Pacific routes are inadequate for the specified commodities when accorded transit privileges at points on the Rio Grande and that—

> "* * * the finding of inadequacy is based upon the lack of in-transit privileges by shippers and receivers located on the Rio Grande * * *",

the majority opinion errs in failing to hold that the order is entirely void, because, as alleged in the Rio Grande's complaint (pages 9-10) to the Commission and as clearly [fol. 193] shown without dispute in the evidence, and as plainly found and stated at page 634 of the Commission's report, there is no absence or lack of in-transit privileges on the Rio Grande but, instead, the fact is that the Rio Grande publishes and makes available to shippers using its line all transit privileges generally offered by other railroads, including the Union Pacific; hence, both the majority opinion and the Commission's order as construed by the majority are premised entirely upon a completely erroneous assumption of fact and, therefore, the order is necessarily null and void, and the majority opinion is fatally and fundamentally erroneous.

IV

As "transit privileges" are not "transportation" which railroads are required by the Interstate Commerce Act,

Section 1(3)(a) and (4), to provide or furnish, but are "commercial operations" as found by the Commission at page 634 of its report, the majority errs in holding that an absence or a lack of in-transit privileges incident to through joint rates via the Rio Grande supports the Commission's finding that transportation service furnished by Union Pacific routes are inadequate for shipments requiring transit privileges at points on the Rio Grande, and in failing to hold that such finding of inadequacy is arbitrary and capricious, and affords no legal basis for the order.

V

The majority opinion errs in relying upon the decision in *Pennsylvania R. Co., et al.* v. *United States, et al.*, 323 U.S. 588, 54 F. Supp. 381, as authority for its holding that the Commission has power to condemn as "inadequate" existing Union Pacific routes which offer all transit privileges and have been found by the Commission to furnish adequate and efficient service to shippers using those routes, and to order a new through route via the Rio Grande that short hauls existing Union Pacific routes merely to make transit [fol. 194] privileges available at points on the Rio Grande, for the Supreme Court's opinion and the Commission's report (255 I.C.C. 33) in the case cited clearly show that the shipper located at Hagerstown, Maryland, already had ample transit privileges and that Hagerstown was located on the line of the Pennsylvania Railroad and was not, as here, a point located upon and served exclusively by some railroad other than the Pennsylvania. The facts in that case are practically the complete reverse of the facts in this case.

VI

The majority opinion errs in failing to hold that the Commission's finding that the joint rates required via the Rio Grande are necessary and desirable "to provide adequate and more economic transportation" does not justify or support the order and is not the complete finding but is only a part of the full finding required under clause (b) of Sec. 15(4), which empowers the Commission to require

through routes that short haul existing routes only upon a finding that the through route proposed to be established—

> "is needed in order to provide adequate, and more efficient or more economic, transportation,"

for the Commission has not found that the Rio Grande route is "needed" or will be "more efficient or * more economic" [fol. 195] than Union Pacific routes, and its report clearly shows that the longer and more onerous Rio Grande route would be less efficient, and as the rates ordered are to be "the same" as the Union Pacific rates, the Commission's statement that the Rio Grande routes are necessary to provide "more economic" transportation is misleading, erroneous, and a complete nullity.

VII

The majority errs in failing to hold that the order is entirely null and void because it is premised on the erroneous and capricious theory that the statutory standards and limitations in Sec. 1(4) of the Act requiring carriers to establish only "reasonable through routes" and in Sec. 15(4) prohibiting the Commission from requiring through routes that short haul existing routes, except upon specific

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* *In D. A. Stickell & Sons, Inc.* v. *Alton R. Co.*, 255 I.C.C. 333, at page 343, the Commission said: "We interpret that exception to mean adequate and more efficient *and* more economic from the public's or shippers' as well as the participating carriers' standpoint." (Emphasis supplied.) That is to say, the Commission construes the word "or" just before the words "more economic" as meaning "and." That interpretation was sustained by the three-judge court in *Pennsylvania R. Co.* v. *United States*, 54 F. Supp. 381, in an opinion which was affirmed by the Supreme Court, *Pennsylvania R. Co.* v. *U.S.*, 323 U.S. 588, at page 593. The Commission has consistently adhered to that interpretation. *Richards Milling Co.* v. *Erie R. Co.*, 268 I.C.C. 237, 240; *General Mills, Inc.* v. *Great Northern Ry. Co.*, 269 I.C.C. 456, 465; *Borough of Edgewater, N. J.* v. *Arcade & A. R. Corp.*, 280 I.C.C. 121, 142, (order held valid in *Baltimore & O. R. Co.* v. *United States*, 100 F. Supp. 1002).

conditions stated therein, empower the Commission to condemn existing routes as inadequate and uneconomical and to order "as many routes as possible" for any commodity artificially classified and merely declared by the Commission as requiring "as much flexibility as possible in the distribution" of such commodity, and "as many markets and outlets as possible", because "a complex but efficient marketing system has been evolved to provide as orderly a distribution of food commodities as possible." The majority erred in failing to hold that the order is void because the Commission has misconstrued or ignored the statutory standards and limitations upon its power to require through routes and joint rates, *U. S.* v. *Carolina Carriers Corp.*, 315 U.S. 475, 489, and has substituted and been guided by its conception of a need of the "complex but efficient marketing system"—not for "reasonable through routes" or a sufficient number of through routes adequate to haul the traffic efficiently and economically—but for "as many routes *as possible*", and "as much flexibility *as possible*" and "as many markets and outlets *as possible.*" (Emphasis supplied.)

[fol. 196] VIII

The majority opinion errs in failing to hold that the order is void because, in making it, the Commission not only failed to apply the statutory standards and, instead, created and substituted its own new philosophy and standards, namely, that it has power to require additional through routes with joint rates upon its own declaration (regardless of its findings that Union Pacific routes are shorter in mileage and require 24 hours less in transit time, and are adequate, and furnish as satisfactory service as any service the Rio Grande could provide) that perishable articles—

> "must be moved to market with expedition and care, and over as many routes as possible"

in order to permit—

> "as much flexibility as possible in the distribution process",

but the Commission has also ignored the very premise which it created for its order, for the report plainly shows that the indisputable purpose and effect of the order is to permit livestock and other specified articles to move—*not* "with expedition and care" *to markets* in "great consuming areas (which) in many instances are far distant from the points of production"—but to move at equal joint rates *to points on the Rio Grande* for transit privileges—

> "such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande",

under which privileges the articles may be held for storage, feeding or grazing at points on the Rio Grande as long as twelve (12) months, before reshipment to distant markets in the "great consuming areas". Stoppage at points on the Rio Grande for storage until markets can be found for such products, stoppage for feeding or grazing cattle for 6 to 12 months until they are ready for market, are all the very antithesis of the premise that such articles require many routes so their perishable nature requires that they [fol. 197] move to consuming markets "with expedition and care."

IX

The majority errs in failing to hold that not only is the premise on which the order is based, namely, that food articles of a perishable nature "must be moved to market with expedition and care, and over as many routes as possible" to permit "as much flexibility as possible" in the distribution of food commodities", unsound, illogical and furnishes no support for the requirement that through routes and joint rates be established via the Rio Grande so that shippers may hold commodities as long as 12 months under transit privileges at points on the Rio Grande before reshipping to distant consuming markets, but also that the premise is wholly inapplicable to and is completely lacking in any support whatever for the requirement of through routes and joint rates via the Rio Grande for (4 carloads annually) *granite* and *marble monuments* westbound in carloads from Georgia and Vermont to stop off for partial unloading and reshipping the balance to destinations in the

northwest area, because such practically indestructible monuments obviously are not in the category of "perishable" food articles, and as the evidence and the report clearly show that the monument dealer's business along the Rio Grande is too small to require carload shipments, the Commission's only purpose in asserting (page 638) that there is an "urgent need", and (page 656) a "special need" for through routes and joint rates via the Rio Grande with the privilege to stop to partly unload at points on that line, is to give the small monument dealer the benefit of the lower carload rate on his less-than-carload business; and the Commission has no power to require through routes and joint rates to accomplish that purpose. The report shows (page 637) that this little monument dealer is located on the Union Pacific at Brigham City, Utah, and has joint rates with all transit privileges at all points on that line.

[fol. 198] X

The majority erred in failing to hold that the Commission's assertion (page 656) that Union Pacific routes "are inadequate and less economical than are the Rio Grande routes" because, on traffic from and to the northwest area accorded transit privileges at points on the Rio Grande—

> "* * * the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply."

is capricious, mere sophistry, based upon a misconception of law, and affords no support or justification whatever for the order. The sentence just quoted is an irrelevant truism, for it is wholly irrational to expect or imply that Union Pacific routes and rates through Wyoming should be available at points *not* located on those routes, but upon the Rio Grande's line in Utah and Colorado, and any informed person would necessarily expect the combination rates via the Rio Grande to be higher than the joint rates via the shorter Union Pacific routes, for a combination of local rates "is ordinarily, if not always, higher than the joint through rate." *Brown Lumber Co. v. L. & N. R. Co.*, 299 U. S. 393, 396. And it is wholly illogical, fallacious and a complete

non-sequitur for the Commission, after stating the truism that the Union Pacific routes and rates are not available and higher rates apply on traffic transited at points on the Rio Grande, to add that—

> "On such traffic the defendants' (Union Pacific) routes are inadequate and less economical than are the Rio Grande routes."

The intended implication that the Union Pacific is under some legal duty to make its existing routes and rates available at points not located on them, and that its failure to do so renders its own routes "inadequate and less economical" than the Rio Grande route on which such points are located and over which "higher rates apply," is contrary to the law governing a carrier's duty, contrary to fact and reason, and is demonstrative of the deceptive and irrational disguises by which the Commission attempts to justify its order.

[fol. 199] XI

The majority erred in failing to hold that the order is void because it is based on the Commission's erroneous view that it has the power to compel an additional through route and equal joint rates embracing another railroad to serve as a "bridge" line that short hauls existing routes wherever, by doing so, it is possible to make additional transit privileges available for perishable articles, at the same joint rates maintained over existing routes, and that the additional transit privileges and joint rates justify a "finding" that such new route will provide "more economic transportation" merely because the result of requiring equal joint rates via such new route is to make its transit privileges available for the same through traffic moving between the same origins and destinations at a cost which will be less than the cost at the combination rates via that route. In other words, the Commission, by compelling reduction of the Rio Grande's rates to equalize them with rates via Union Pacific routes, creates the very fact or circumstance on which it bases and attempts to justify the prerequisite jurisdictional finding, or assertion, at least in the words of clause (b), that the Rio Grande route will

provide "more economic transportation," regardless of the fact that the shippers' cost (rates) will be exactly the same as it is now via Union Pacific routes.

XII

The majority errs in failing to hold that the Commission acted arbitrarily and unlawfully in exerting its power to prescribe joint rates that would reduce the combination rates via the Rio Grande to the level of joint rates via Union Pacific routes in its efforts to create a factual situation which might justify a finding or declaration that the Rio Grande route with equal joint rates will provide "more economic transportation," and, by that arbitrary subterfuge, manufacture a case within the clause (b) exception to the prohibition in Section 15 (4) against compelling a [fol. 200] proposed through route that would short haul existing routes; and the majority further erred in failing to hold that the Commission's power to prescribe joint rates has no relationship to the term "more economic transportation" in Section 15 (4)(b), and that the Commission has exceeded its authority in attempting to use its joint rate powers to meet and satisfy a condition in Section 15(4) under which, upon a true set of facts, it would be justified in requiring a proposed route that would short haul existing through routes; and the majority erred also in failing to hold that the "more economic transportation" via the Rio Grande which would result from the Commission's reduction of the combination rates via that line to the level of the joint rates via Union Pacific routes, affords no support whatever for the order for the reason that the criterion, "more economic transportation," means that the proposed new route must provide "more economic transportation" than that provided by existing routes, and the criterion is not satisfied by a reduction in the Rio Grande's rates to make them lower than its previous combination rates, or by requiring equal joint rates over the respective routes, and the Commission's findings plainly show that, even with equal joint rates, the transportation over the "more onerous" Rio Grande line would be *less "economical"* than via the shorter, faster and more favorably located Union Pacific routes.

XIII

Under the holding in the majority opinion that absence of in-transit privileges may be made the basis of a finding that transportation service is "inadequate," and even if, as the majority opinion erroneously assumed, transit privileges were not available at points on the Rio Grande, then it would be only the transportation service of the Rio Grande that could be condemned and found to be inadequate, and not the service of the Union Pacific routes on which all transit privileges are admittedly available.

[fol. 201] XIV

Upon the Commission's findings, among others, that Union Pacific facilities—

> "* * * are adequate to move over its own direct routes the present volume of trafic and any additional volume that may be anticipated in the foreseeable future";

that the Union Pacific—

> "* * * has surplus capacity, is efficiently operated, and furnishes good service to shippers over its line" (page 648);

that—

> "* * * through service over defendants' (Union Pacific) routes, in general, is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande * * *" (page 656);

that—

> "Traffic routed over the Rio Grande as a bridge line would require at least 24 hours additional time in transit than when routed over the Union Pacific, and would require one or two more terminal-yard services" (page 648);

that because of physical and geographic facts recited in its report and its longer mileage—

> "* * * the Rio Grande line is less favorably situated than that of the Union Pacific" (page 648),

and that—

> "* * * as indicated previously herein, the operating conditions on the Rio Grande are more onerous than those on the lines of the Union Pacific or any of the other transcontinental defendants herein";

and upon the findings in the majority opinion (page 17) that for traffic moving between points in the northwest area and points of initial destination east of Denver—

> "* * * present transportation facilities over the Union Pacific between such points are adequate";

and that establishment of the joint rates via the Rio Grande between such points—

> "* * * would not make such service more economical, because the rates for such service would only equal the present rates via the Union Pacific between those points,"

the majority patently errs in finding (page 17) that the record supports the finding that transportation service via Union Pacific routes "is inadequate and also inefficient [fol. 202] and uneconomical" for shipments between the northwest area and final destinations east of Denver which require stoppage for transit purposes at points on the Rio Grande (not served by the Union Pacific), and in concluding (page 19) that the evidence supports the Commission's finding that establishment of the through routes and joint rates via the Rio Grande—

> "is necessary in order to provide adequate and more economic transportation"

for shipments requiring transit privileges at points on the Rio Grande.

XV

In holding (page 19) that—

> "The absence of in-transit and other privileges involved herein, incident to through joint rates will, under the law, support a finding that transportation service without such services and privileges is inadequate within the meaning of Sec. 15 (4)"

and that, therefore, the evidence supports the order to the extent it compels through routes and joint rates for shipments requiring transit privileges at points on the Rio Grande, the majority opinion is fatally erroneous because (1) as held by the Commission at page 655 of its report and in the majority opinion at page 10, the Commission has no power to require establishment of an additional through route with joint rates that short hauls existing through routes "unless the existing routes can be found not to provide 'adequate' transportation", and (2) since there is no "absence of in-transit and other privileges" on the Union Pacific routes from *the* to the Northwest area, and (3) as the Commission finds unequivocally that the Union Pacific facilities "are adequate" to move all traffic to and from the northwest area that may be offered in the future, that it has surplus capacity, is efficiently operated, and that service via Union Pacific routes—

> "is as satisfactory to the shipping public as the service which could be provided over routes including the Rio Grande",

there is completely lacking any possible factual basis for the [fol. 203] crucial and essential finding, namely, inadequacy of existing Union Pacific routes, which is prerequisite to an exercise of the authority under Sec. 15(4)(b) to order the Union Pacific to short haul itself by joining in a new through route with joint rates via the Rio Grande.

XVI

The majority opinion erroneously states on page 6 that the Commission found that—

> "* * * the existing joint rates maintained by the Union Pacific are and will be *unjust and unreasonable and unduly prejudicial* * * *"

etc., whereas the fact is that the Commission made no finding that the rates via Union Pacific routes were unreasonable or unlawful in any respect, but instead found that the combination rates via the Rio Grande were unreasonable, unduly prejudicial and unduly preferential, and the majority errs in holding that the Commission has power to require through routes and joint rates via the Rio Grande without having first decided whether, as urged by Movants upon briefs and in oral argument, there is any evidence to support or justify the Commission's finding that the combination rates via the Rio Grande are unjust or unreasonable.

XVII

The majority errs in failing to hold that, in view of the fact proved by abundant uncontradicted evidence that producers and shippers in the northwest area who are now using the Union Pacific routes, market their perishable products in all 48 states and several foreign countries and the Commission's own finding at page 642, that those producers and shippers "market such products throughout the United States", the Commission's assertion (page 656) that those shippers—

> "* * * are debarred from effective participation in the widespread system developed for the marketing of such commodities"

is contrary to the evidence, contradicted by the Commission's [fol. 204] own finding of fact, and is void and therefore furnishes no support whatever for the order.

XVIII

Having held (page 15) that—

> "* * * there is no community of interest between the Union Pacific and the Rio Grande and hence there is no discrimination by the Union Pacific within the prohibition of Sec. 3(1).",

and that if the Commission could order through routes and joint rates because shippers located on one railroad have a transportation advantage over shippers located on another railroad "the prohibition of Sec. 15(4) would be practically emasculated", the majority erred in failing to hold, for the same reason, that the order does emasculate the prohibition in Sec. 15(4) and is void because its sole purpose and effect is—not to accomplish the objectives of the limited through route powers conferred by Sec. 15(3) and (4) to compel an additional route that short hauls existing routes when the latter are inadequate in fact and in truth—but to equalize rates and transit privileges of shippers located on or using the Rio Grande with shippers located on or using Union Pacific routes, and if equalization of rates and transit privileges via the Rio Grande with those on Union Pacific routes justifies compelling the Union Pacific to short haul itself by establishing a through route and joint rates with the Rio Grande for the involved traffic, then the short haul prohibition is completely emasculated.

XIX

The majority erred in failing to hold that the facts shown by the evidence and recited in the Commission's own correct findings of fact establishing vast physical and other dissimilarities between transportation conditions on the Rio Grande compared to those on the Union Pacific preclude any finding by the Commission of a violation of Sec. 3(1) of the Act; and in failing to hold that the Commission has acted arbitrarily and unlawfully in attempting to escape [fol. 205] the compelling legal effect of such dissimilarities (1) by its mere assertion that when "spread over hauls of great lengths * * * they become relatively insignificant", and that, therefore, for such hauls, "the transportation

conditions are substantially similar"; and (2) by resorting to it through routes powers under Sec. 15(3) and (4) and thereupon ignoring the vast differences it found in transportation conditions over the "more onerous" Rio Grande line compared to conditions on the "Union Pacific or any of the other transcontinental defendants herein," by treating such differences as unrelated to and requiring no consideration in determining whether the Rio Grande route would provide "more economic transportation" within the meaning of those words in Sec. 15 (4) (b), than the transportation furnished by existing Union Pacific routes.

XX

Upon its finding (page 18) that an "economic disadvantage" of shippers located on the Rio Grande compared to shippers located on the Union Pacific affords no basis for the Commission's finding of a violation of Sec. 3(1) of the Act because—

> "* * * there is no community of interest between the Union Pacific and the Rio Grande * * *",

the majority errs in holding, in effect, that there is a "community of interest" or some other undefined relationship between those two railroads which legally justifies requiring the Union Pacific to short haul itself 1000 miles, regardless of Sec. 15(4), by establishing joint rates with the Rio Grande to remove the claimed "economic disadvantage" of shippers located on the Rio Grande (so far as it consists of higher rates) by giving those shippers rates which, as correctly stated in the minority opinion, "would only equal the present rates via the Union Pacific" for the same through traffic between the same points of origin and the same final destinations.

[fol. 206]

XXI

The majority opinion errs in sustaining the order as if the Commission made it solely for the benefit of shippers located on the Rio Grande, whereas the Commission's report clearly shows that the order is for the principal purpose of enabling shippers not located on the Rio Grande

but on the Union Pacific and other lines northwest of Ogden, to enable them to route over the Rio Grande as a "bridge" line the traffic which they now ship over Union Pacific routes at the lowest joint rates with complete transit privileges, and as the majority opinion, to the extent it holds the order valid, is premised on the absence or lack of transit privileges, it fails to take into consideration the essential fact that shippers in the northwest area who are said by the Commission (page 656) to be "debarred from effective participation" in the marketing system, already have available to them on the Union Pacific routes the same transit privileges and the same joint rates they would have on the Rio Grande under the Commission's order, and in failing to decide whether, in view of these facts, the order is entirely void.

XXII

The majority opinion at page 8 states that shippers "located on the Rio Grande" are "without joint through rates with in-transit privileges" and, therefore, they "are at a substantial rate disadvantage" compared to shippers located on the Union Pacific who have "joint through rates and in-transit privileges over the Union Pacific". To the extent it sustains the validity of the order, the majority errs in holding that the Commission may use its power to compel through routes and joint rates to remedy a "rate disadvantage" of shippers located on the Rio Grande.

[fol. 207]

XXIII

Inasmuch as the transportation service which shippers located on or using the Rio Grande under the requirements of the Commission's order and as the transit privileges under the order would be identically the same transportation services and transit privileges now performed and offered by the Rio Grande, and since the only change effected by the order is to reduce the present rates via the Rio Grande to the level of rates via Union Pacific routes, the majority opinion errs in failing to hold that the order is void because (1), as shown by the evidence and the report, it will not result in any improvement or any change whatever in transportation services via the Rio

Grande or the Union Pacific but will only result in reducing the rates via the Rio Grande, and (2) because the Commission may not lawfully use its power to establish through routes and joint rates in order to compel a reduction or an equalization of rates.

XXIV

Having held (page 12) that service via the Union Pacific is adequate and as economic as service via the Rio Grande would be for shipments *not* requiring transit at points on the Rio Grande, the majority clearly errs in holding that the evidence supports the finding that establishment of joint rates and through routes for shipments requiring transit at points on the Rio Grande "will result in more economical transportation", because, as correctly found at page 17 of the majority opinion, the joint rates via the Rio Grande required by the order—

> "would only equal the present rates via the Union Pacific".

XXV

The majority erred in failing to hold that the Commission is without power to condemn, as it has done in this case, the Union Pacific routes, as "inadequate and less economical than are the Rio Grande routes", solely because—

> [fol. 208] "the Union Pacific routes and joint rates which apply over them are not available, and higher rates apply"

on traffic moving via the Rio Grande from and to the northwest area which is stopped for transit privileges at some point on the Rio Grande.

XXVI

The majority opinion errs in failing to hold that the inclusion of livestock in the order is without justification or support in the evidence or findings in the Commission's report which, without explanation or reason, treats ordinary livestock as a perishable food article, saying merely that—

> "We think however that the situation here as to livestock is no different from that portrayed as to certain

other commodities with respect to the need for competitive routes over the Rio Grande via the Ogden Gateway."

The report shows there are joint rates via the Rio Grande and the Union Pacific on sheep and goats, established pursuant to the formula prescribed by the Commission in *Livestock, Western District Rates*, 176 I.C.C. 1, which formula resulted in higher rates over the Rio Grande because of its longer route. The report in the case at bar shows at page 641 that the Union Pacific expressed its willingness to establish rates via the Rio Grande in accordance with that formula and make them applicable to cattle as well as sheep and goats but that it has never been requested to do so. Without support of any evidence or finding of basic facts, the Commission's order here arbitrarily and irrationally upsets and departs from its own formula of many years standing by prescribing "the same" joint rates for livestock via the Rio Grande that are maintained via the shorter Union Pacific routes, and this it may not lawfully do. *Agriculture* v. *I.C.C.*, — U.S. —, 71 S. Ct. 326.

[fol. 209]

XXVII

The majority opinion is premised, in part, upon "the factual theory" (pages 7-8) that livestock feeders located on the Rio Grande are at a "substantial rate disadvantage" with similar livestock feeders—

> "* * * located on the Union Pacific lines between Ogden and Provo, and between Ogden and Salt Lake City and Denver, located on the Union Pacific * * *";

and that there "are a number of industries" on the Rio Grande that are "without in-transit privileges" for processing, freezing, storing articles specified in the order and reshipping them to points east of Denver, Pueblo and Trinidad. The majority erred in failing to hold that there is no evidence showing that any livestock feeders are located on the portion of the Union Pacific described in the opinion; and that the evidence and the Commission's report plainly show that there are only four "industries" that process, freeze or store articles on which the order requires

through routes and joint rates, one of which, a small "bean dealer", is located near Grand Junction, two storage plants at Pueblo, and one bean dealer at Colorado Springs, and that the latter three have through routes and joint rates to and from the northwest via the Union Pacific to Denver and railroads that connect with it, including the Rio Grande, to Pueblo and Colorado Springs with ample transit privileges to permit the processing, storing, freezing, etc. of their products and reshipping them from those points at the joint rates; and that the Commission's report at page 644 mentions the Utah Growers' Co-Operative with plants at Midvale, American Forks and Springville, Utah, all three of which points are served by both the Union Pacific and the Rio Grande, the Union Pacific's rate on commodities from the northwest being lower than the combination rates via the Rio Grande through Ogden or Salt Lake.

[fol. 210] XXVIII

The majority errs in failing to hold that the Commission's finding that the Union Pacific discriminates, in violation of Sec. 3(4) of the Act, against the Rio Grande by maintaining joint rates with the Bamberger Railroad at points on that railroad between Ogden and Salt Lake City (most of which points are also served by both the Union Pacific and the Rio Grande) while refusing to establish joint rates with the Rio Grande at those points, (1) is totally void because the record contains no evidence whatever comparing or concerning transportation conditions on the Bamberger, the Rio Grande and the Union Pacific between Ogden and Salt Lake City, and therefore the Commission's statement (page 659) that—

"* * * it appears that there is no important dissimilarity between the transportation conditions * * *"

is wholly lacking in any evidence to enable the Commission to make any finding on that alleged discrimination, and this lack of evidence, as pointed out in Circuit Judge Johnsen's dissenting opinion, was not denied by counsel for either the United States, the Commission in briefs or oral argument to this Court, and, as "a finding without evidence is

beyond the power of the Commission", *U.S. v. Abilene & So. Ry. Co.*, 265 U.S. 274, 288, the majority erred in refusing to hold that the finding is void; and the majority further erred in failing to hold that, even if there had been evidence to support the finding of discrimination in violation of Sec. 3(4), it would not afford any justification for the order requiring through routes and joint rates with the Rio Grande at points between Ogden and Salt Lake City, or any remote semblance of justification for the requirement of joint rates over the entire length of the Rio Grande's lines, and, as stated in the majority opinion, pages 14 and 15, in nullifying the Section 3(1) finding, the Commission has ample power to correct a violation of Section 3(4), and if it could [fol. 211] order through routes and joint rates as a remedy for such discrimination, "the prohibition of Sec. 15(4) would be practically emasculated."

XXIX

The majority erred in failing to hold that, upon its findings that the Rio Grande had not sustained its complaint, the Commission acted arbitrarily and exceeded its power in refusing to dismiss the complaint, and in ordering through routes and joint rates on the theory that because shippers had intervened, the Rio Grande's complaint became a shipper complaint.

XXX

Upon its correct conclusion that Sec. 3(1) of the Act could not furnish any basis for the order, the majority erred in failing to hold that the order is entirely void, since the Rio Grande's complaint and the order also premised relief sought upon Section 3(1).

XXXI

Since the Commission made no findings to sustain any violation of the Act against the Rio Grande (except the trivial unsupported finding of discrimination along the Bamberger Railroad), and could find only a violation of Section 3 involving shippers' rights and relations, which finding the majority holds to be without evidential support and as furnishing no basis for the order, the majority errs

in failing to hold that the order is entirely void because there is no basis or support for it in the evidence or in the Commission's findings.

[fol. 212] XXXII

The majority erred in refusing to consider and decide whether the Commission acted arbitrarily in refusing to dismiss the proceeding upon the ground urged by these Movants that as the sole objective of the Rio Grande in filing the complaint and demanding through routes and joint rates was, as admitted by its President, improvement of its financial condition, the Commission is prohibited by Section 15(4) from ordering through routes and joint rates for that purpose.

XXXIII

The majority erred in failing to hold that the Rio Grande's admitted procurement of shippers and others to testify so as to help it win its case, and that the intrusion of Senator Johnson, while the case was pending before the Commission, vitiated and nullified the whole proceeding before the Commission.

XXXIV

The majority erred in failing to hold that the Commission acted arbitrarily in refusing to give any weight to abundant evidence showing that compelling the through routes and joint rates sought by the Rio Grande would result in wasteful transportation and economic waste, and in serious detriment to the Union Pacific and other railroads and their employees, and in refusing to require as a condition or part of its order that the Rio Grande compensate or protect Union Pacific employees for or against any adverse effect they might suffer in loss of wages, etc., resulting from loss of traffic to the Rio Grande under an order requiring through routes and joint rates via its line for the traffic it seeks.

XXXV

The majority erred in failing, so far as its decision discloses, to give consideration to most of the numerous contentions set forth and discussed in the briefs of the plain-

[fol. 213] tiffs and intervening plaintiffs, as reasons why the Commission's order is void and should be enjoined and annulled. Without repeating each of those contentions, we respectfully refer the Court to them, as set forth in the index of our briefs filed at the trial of this case, and request that each of them be carefully considered and decided, unless the Court, upon this Motion and that of the Rio Grande, decides to enjoin and annul the order in its entirety without the necessity of considering all of the grounds upon which the plaintiffs and intervening plaintiffs contend that the order is void.

Respectfully submitted, Elmer B. Collins, John J. Burchell, James C. Wilson, F. O. Steadry, L. E. Torinus, Warren H. Ploeger, Roland J. Lehman, Eugene S. Davis, Attorneys for Plaintiffs, 1416 Dodge Street, Omaha 2, Nebraska; Don Eastvold, Attorney General of Washington, Robert L. Simpson, Asst. Attorney General of Washington, Attorneys for Washington Public Service Commission, State Capitol, Olympia, Washington; C. W. Ferguson, Attorney for Public Utilities Commissioner of Oregon, Public Service Building, Salem, Oregon; James B. Patten, Attorney for Board of Railroad Commissioners of the State of Montana, Helena, Montana; Howard B. Black, Attorney General of Wyoming, Attorney for State Board of Equalization and Public Service Commission of Wyoming, Cheyenne, Wyoming; Clarence S. Beck, Attorney General of Nebraska; Bert L. Overcash, Assistant Attorney General of Nebraska, Attorneys for State of Nebraska and Nebraska State Railway Commission, State Capitol, Lincoln, Nebraska, Attorneys for Intervening Plaintiffs.

[fol. 214] I, Elmer B. Collins, certify that copies of the foregoing Motion are being sent by United States Mail this 12th day of November, 1954, to all interested parties through their counsel.

Elmer B. Collins, Of Counsel.

[fol. 215] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

PLAINTIFFS' APPLICATION FOR ORDER STAYING, SUSPENDING THE OPERATION AND ENJOINING AND RESTRAINING ENFORCEMENT OF THE INTERSTATE COMMERCE COMMISSION'S ORDER PENDING FINAL DECISION AND DISPOSITION OF THE CASE BY THIS COURT—Filed November 17, 1954.

Plaintiffs,* Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, respectfully make this application to the specially constituted three-judge Court pursuant to 28 U.S.C.A., Sections 2284(3) and 2324, for an order staying, suspending the operation, and enjoining and restraining enforcement of the order of the Interstate Commerce Commission issued January 12, 1953, in its Docket No. 30297 (copy of which is attached as Appendix A to the complaint praying that said order be permanently enjoined and annulled in the above-entitled suit), pending final decision, determination and disposition of the case by this Court.

In support of this application plaintiffs respectfully show to the Court that said order, by its terms, requires that [fol. 216] 221 railroads, including plaintiffs herein, file tariffs with the Commission publishing rates as specified in the order originally to become effective April 7, 1953, upon 30 days' notice, but that, because of the filing of petitions for reconsideration with the Commission, and upon requests of a member of this Court made since the filing of

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*For reasons concerning it individually, Chicago, Milwaukee, St. Paul and Pacific Railroad Company has concluded that it can not consistently participate in further proceedings in this case.

the complaint herein on June 25, 1953, the Commission has several times postponed the effective date of said order, and that after the majority and the dissenting opinions were filed in this case on October 22, 1954, upon the request of counsel for the plaintiffs, the Commission, by order dated October 25, 1954, copy of which is attached hereto as Appendix A, further postponed the effective date of its said order of January 12, 1953, so as to become effective February 1, 1955 by filing the required tariffs with the Commission upon 30 days' notice, which means that the tariffs would have to be filed not later than January 2, 1955.

In their complaint filed June 25, 1953, in this suit plaintiffs pray, among other things:

> "That this Court, by temporary stay, preliminary or interlocutory injunction, stay, restrain and suspend the operation of the order of the Commission dated January 12, 1953, pending the final hearing and determination of this action."

Because of the Commission's voluntary postponements of the effective date of said order, the Court did not act upon the prayer just quoted for temporary and interlocutory relief from the order pending hearing and decision of the case by this Court, but now, since the Court has filed its decisions, the Commission will not, according to information of counsel for plaintiffs and their knowledge of the position taken by the Commission in other similar situations, be disposed voluntarily to further postpone the effective date of its said order, particularly in view of the fact that the Court has heard and reviewed the case upon the record before the Commission and has rendered and filed its decisions, in which the majority opinion sustains the validity of the order in part, and the further fact that the Court has ample authority to suspend the operation of the [fol. 217] order and to protect the plaintiffs and numerous other railroads against the penalties provided by Section 16 of the Interstate Commerce Act (49 U.S. Code, Sec. 16), in the amount of $5,000.00 per day for each of the plaintiffs and other railroads that fail to file and publish tariffs as required by the order and on the date therein specified.

The records in the Clerk's office of this Court show that,

although no decree or judgment has yet been entered in this suit, intervening defendant, The Denver and Rio Grande Western Railroad Company, on November 1, 1954, filed its motion for a new trial or in the alternative for reargument, and that on November 12, 1954, the plaintiffs also filed a motion for new trial or in the alternative for reargument and reconsideration by the Court, and that both of said motions are pending consideration, action and final disposition by the Court.

Plaintiffs hereby inform the Court that, unless the interlocutory relief herein sought is granted, relieving plaintiffs of the necessity of preparing and filing the required tariffs, numerous tariff compilers and experts of plaintiffs and other railroads would have to begin work shortly after December 1, 1954, in order to complete the preparation, compiling, printing and filing of the required tariffs by January 2, 1955 as now required by the Commission's order of October 25, 1954.

Plaintiffs further show to the Court that the compilation, preparation, printing and filing of the required tariffs is an unusually burdensome, time-consuming task, and would cost plaintiffs and the other railroads named as defendants in the proceedings before the Commission many thousands of dollars, all of which would be completely wasted and irreparably lost if the Commission's said order is finally annulled and enjoined.

Plaintiffs further show to the Court that, as indicated above, they and numerous other railroads, and each of them individually, will be subjected to the penalty of $5,000.00 [fol. 218] for each day of their failure, if any, to file and publish tariffs on the date and in conformity with the requirements of the Commission's said order, and that said penalties would accrue to the United States and could not be recovered but would be irreparably lost by the plaintiffs and other railroads, even though the Commission's order be finally held void and annulled and enjoined.

Plaintiffs further show to the Court that during the year 1952 there were moved between points in the northwest area and points east and south of Denver 54,664 carloads of the commodities on which the Commission's order requires through routes and joint rates via the Rio Grande, on which traffic the Union Pacific earned revenues esti-

mated at $18,827,148.00; that if this same number of carloads of that traffic were routed via the Rio Grande as permitted by the Commission's order, so as to deprive the Union Pacific of participation in the movement east of Ogden, Utah, Union Pacific would lose revenues estimated at $11,772,986.00; that at page 1,656 of the transcript of record before the Commission (introduced as Exhibit No. 1 before the Court in this case) witness F. C. Hogue, Vice President—Traffic of The Denver and Rio Grande Western Railroad Company, testified that he expected the Rio Grande to divert to its line from the Union Pacific routes approximately 10% of the traffic on which it sought through routes and joint rates in the Commission proceeding; that, based on the 1952 traffic, the diversion to the Rio Grande so estimated would be 5,466 carloads and a loss in revenues by the Union Pacific of $1,177,298.00 annually, or approximately $3,225.00 per day; that other plaintiffs would similarly suffer large losses of revenues, all of which losses would result in irreparable damage and injury to the Union Pacific and other plaintiffs, inasmuch as they would be without any legal remedy to recover such losses.

Plaintiffs further show to the Court that the validity of the Commission's order is unusually and extremely doubt-
[fol. 219] ful, as clearly indicated by the dissenting opinions of several of the Interstate Commerce Commissioners (287 I.C.C. 611), and by the majority opinion of this Court holding the order valid only in part as therein indicated, and by the dissenting opinion holding that the order should be stricken down in its entirety for the reasons therein stated, that present Union Pacific routes have existed for some 40 years, during which time the Rio Grande has never participated as a "bridge" line in through routes and joint rates for the involved traffic, and that justice and equity require that the *status quo* be maintained pending final determination and disposition of this case.

Plaintiffs allege that to subject them to the statutory penalty of 5,000.00 per day for failure to comply with the order, or in the alternative to comply with the order and suffer irreparable loss in revenues, while litigating the question whether the order is valid, would in effect nullify their statutory right to judicial review of the order, thus result-

ing in the taking of their property without due process of law and depriving them of their constitutional rights to equal protection from the law with owners of other kinds of property.

Wherefore, plaintiffs pray that, in view of the necessity of the relief herein prayed being granted as early as possible to avoid irreparable loss to plaintiffs resulting from the work and expense of compiling and preparing tariffs which they would have to begin about December 1, 1954, and to prevent other irreparable injury and damage as shown above, and for other reasons herein stated, the specially constituted three-judge Court reconvene at as early a date as possible to consider this application, and that the Court thereupon issue an order staying, suspending the operation and enjoying and restraining enforcement of the Commis-
[fol. 220] sion's said order pending consideration by the Court of the motions now on file for new trial, and pending final decision and entry of final decree or judgment herein by the Court.

Respectfully submitted, Elmer B. Collins, John J. Burchell, James C. Wilson, F. O. Steadry, L. E. Torinus, Warren H. Ploeger, Roland J. Lehman, Eugene S. Davis, Attorneys for Plaintiffs, 1416 Dodge Street, Omaha 2, Nebraska.

[fol. 221] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 222] APPENDIX "A" TO APPLICATION

Order

Interstate Commerce Commission

No. 30297

DENVER & RIO GRANDE WESTERN RAILROAD COMPANY

v.

UNION PACIFIC RAILROAD COMPANY ET AL.

In the Matter of Request of Counsel for Postponement of the Effective Date of the Order.

Present: Charles D. Mahaffie, Acting Chairman, to whom the above-entitled matter has been assigned for action thereon.

Upon further consideration of the record in the above-entitled proceeding and upon consideration of the telegraphic request of Elmer B. Collins, Esq., Assistant Western General Counsel, Union Pacific Railroad Company, for postponement of the effective date of the Commission's order of January 12, 1953, as amended, to afford opportunity for counsel to study and analyze the majority and dissenting opinions of the United States District Court, District of Nebraska, rendered on October 23, 1954, in the suit filed in said Court to set aside the aforesaid order of the Commission in this proceeding, and to allow time for counsel to prepare and file application for stay of the Commission's order pending appeal to the United States Supreme Court; and Robert E. Quirk, Esq., Counsel for the Denver & Rio Grande Western Railroad Company having agreed to the requested postponement.

It is ordered, That the order entered in said proceeding on January 12, 1953, as amended, requiring the carriers to take certain action on 30 days' notice, which was subsequently modified to become effective on December 1, 1954, without change in the notice requirement, be, and it is

hereby, further modified to become effective February 1, 1955, with the same requirements as to notice.

Dated at Washington, D. C., this 25th day of October, A. D. 1954.

By the Commission, Acting Chairman Mahaffie.

George W. Laird, Secretary.

(Seal)

[fol. 223] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

RESPONSE OF INTERSTATE COMMERCE COMMISSION TO THE MOTIONS OF PLAINTIFFS AND INTERVENING DEFENDANT THE DENVER AND RIO GRANDE WESTERN RAILROAD FOR A NEW TRIAL OR REARGUMENT AND RECONSIDERATION—Filed November 24, 1954

In response to the motions of plaintiffs and intervening defendant Denver and Rio Grande Western Railroad Company, in the above-styled cause, for a new trial or reargument and reconsideration, the Interstate Commerce Commission, one of the defendants herein, submits that said motions present matters and controversies between the parties to said motions and the Court, which already has given full and mature consideration to the issues raised therein, with respect to which the Commission does not believe it appropriate to express any further opinion, as it has not filed any such motion for a new trial.

However, in taking this position the Commission does not waive any right it may have to file a cross appeal to that portion of the Court's opinion and final judgment that holds the Commission's decision and order invalid, or that it may not want to appear at the hearing on said motions and take such position and answer such inquiries as to the Court may appear proper.

[fol. 224] In view of the fact that plaintiffs have filed an application for an order staying, enjoying and restraining enforcement of the Commission's order pending final decision and disposition of the case by this Court, it is suggested that this application and the aforesaid motions for new trial or reargument and reconsideration be set for hearing at the same time if it meets the convenience of the Court, and if the Court determines that a hearing on such motions and application is necessary or desirable. It should be clearly understood, however, that in making this request, we are not requesting a hearing on either the motions or the application for a stay pending appeal.

Respectfully submitted, Edward M. Reidy, General Counsel. Samuel R. Howell, Assistant General Counsel, Of Counsel.

[fols. 225-226] Service (omitted in printing)

[fol. 227] Clerk's Certificate of Service of Response (omitted in printing)

[fol. 228] In the District Court of the United States for the District of Nebraska, Omaha Division

[Title omitted]

Final Judgment and Decree—December 20, 1954

The above-entitled action having come on for final hearing on November 23 and 24, 1953, before Circuit Judges Johnsen and Collet and District Judge Delehant, constituting a District Court of three judges, convened pursuant to Title 28 U.S.C., Sections 2284 and 2325, and all parties being represented by counsel and the Court having received the evidence offered by the parties and heard the arguments of counsel and having considered the pleadings, the evidence and the arguments and briefs of counsel, and

the Court being fully advised in the premises and having filed its opinions, findings of fact and conclusions of law herein on October 22, 1954, and the majority of the Court being of opinion that the order of the Interstate Commerce Commission dated January 12, 1953, in its Docket No. 30297, is valid and lawful in part and invalid and unlawful in the particulars set forth in the majority opinion;
[fol. 229] Now, therefore, upon the basis of such findings of fact and conclusions of law, and for the reasons set forth in the majority opinion of the Court, heretofore filed; it is ordered, adjudged and decreed that the injunction and other relief prayed for in the complaint be granted and denied, consistent with said findings of fact, conclusions of law and the majority opinion of the Court filed herein;

It is further adjudged and decreed that this Court has no power under the Interstate Commerce Commission Act to determine whether it would be in the public interest and consistent with good transportation practices to put into effect only that part of the order of the Interstate Commerce Commission held to be lawful, without regard to and independent of that part of the order held to be unlawful, and, that question being one which should under the law be determined by the Interstate Commerce Commission in the exercise of its informed judgment in its specialized field;

It is ordered, adjudged, and decreed that this cause be and is hereby remanded to the Interstate Commerce Commission for such further proceedings and orders, consistent with the majority opinion, the findings of fact and conclusions of law, as the informed judgment of the Commission may dictate.

Dated this 20th day of December, 1954.

/S./ John C. Collet, Judge, United States Court of Appeals; /S./ John W. Delehant, Judge, United States District Court.

[File endorsement omitted.]

[fol. 230] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER DENYING MOTIONS FOR NEW TRIAL—December 20, 1954

Upon consideration of the separate motions for new trial,

It is considered and ordered:

1. That the motions be and they hereby are overruled and denied;

2. That the Clerk transmit forthwith copies of this Order to counsel in this case.

Dated this 20th day of December, 1954.

By the Court: /S./ Harvey M. Johnsen, Judge, United States Court of Appeals; /S./ John C. Collet, Judge, United States Court of Appeals; /S./ John W. Delehant, Judge, United States District Court.

[File endorsement omitted.]

[fol. 231] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

PLAINTIFFS' APPLICATION FOR INJUNCTION PENDING APPEAL

Filed December 20, 1954

Plaintiffs, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, state to the Court that

they will perfect an appeal to the Supreme Court of the United States under Title 28, U.S. Code, Section 1253, from the final decree entered Dec. 20, 1954, by this Court in the above-entitled case, and, pursuant to the provisions of Rule 62(c) of Federal Rules of Civil Procedure (Title 28, U.S. Code), plaintiffs hereby apply for an injunction pending their appeal, staying, suspending the operation and restraining and enjoining the enforcement of the order of the Interstate Commerce Commission issued January 12, 1953, in a proceeding entitled "No. 30297, Denver & Rio Grande Western Railroad Company v. Union Pacific Railroad Company et al." (the validity of which order is the [fol. 232] subject of the above-entitled suit), and enjoining and restraining the defendants herein, United States of America and Interstate Commerce Commission, and each of their officers, agents and employees and any and every person acting under and by virtue of said order, from enforcing or attempting in any way to enforce the provisions of said order, and from taking any action to collect or enforce or attempting to enforce or collect the penalties provided by Title 49, U.S. Code, Section 16 (8) for failure of the railroads, including the plaintiffs herein, named as defendants in the proceeding before said Commission, to comply with the requirements of said order pending final determination of plaintiffs' appeal to the Supreme Court of the United States.

In support of this application and as grounds for the injunction pending appeal herein prayed, plaintiffs state and show to the Court:

I.

This Court has ample power in its discretion to issue an injunction staying and suspending operation and restraining and enjoining enforcement of the Commission's order pending final determination of plaintiffs' appeal to the Supreme Court of the United States.

As an incident of their jurisdiction, the Federal Courts have the power within their discretion to preserve the *status quo* pending appeals from their decisions, and in *Virginian Ry.* v. *United States*, 272 U.S. 658, 668-675, the Supreme Court held that it is within the power and discre-

tion of specially-constituted District Courts of three judges to suspend and restrain enforcement of orders of the Interstate Commerce Commission pending appeals to the Supreme Court. The power sustained in that decision was thereafter enacted by Congress as Rule 62(c) Federal Rules of Civil Procedure, Title 28, U.S. Code, as follows:

> "*Injunction Pending Appeal.* When an appeal is taken from an interlocutory or final judgment grant- [fol. 233] ing, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order."

In *Scripps-Howard Radio* v. *Comm'n.*, 316 U.S. 4, at page 10, the Supreme Court said:

> "If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made. The existence of power in a reviewing court to stay the enforcement of an administrative order does not mean, of course, that its exercise should be without regard to the division of function which the legislature has made between the administrative body and the court of review. 'A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. *In re Haberman Manufacturing Co.*, 147 U.S. 525. It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case.' *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 672-73; see *Merchants Warehouse Co.* v. *United States*, 283 U.S. 501, 513-14."

The facts and circumstances which justify the exercise of the power and discretion of specially-constituted three-judge District Courts to issue injunctions staying and restraining enforcement of orders such as the instant order of the Commission, pending appeals to the Supreme Court are found in many decisions. In *Virginian Ry.* v. *United States, supra*, the Supreme Court held, at page 673, that:

> "To justify granting the stay after a final decree sustaining the Commission's order, it must appear either that the district court entertains a serious doubt as to the correctness of its own decision; or that the decision depends upon a question of law on which there is conflict among the courts of the several circuits; or that some other special reason exists why the order of the Commission ought not to become operative until its validity can be considered by this Court."

In *Warehouse Co.* v. *United States*, 283 U.S. 501, the validity of an order of the Commission had been sustained by two members of the three-judge District Court, the third judge vigorously dissenting. A stay of the Com-[fol. 234] mission's order pending appeal to the Supreme Court was issued by the District Court under circumstances very similar to those in the case at bar. In disposing of cross-appeals from that action, the Supreme Court held at pages 513-514:

> "The court below was within the limits of its discretionary power in staying the Commission's order pending the appeal. The practice complained of was of long standing, entered into, so far as appears, in good faith, at a time when the discrimination, if it existed, was much less serious than at present, and before the present prohibitions against such discriminations. Its legality now is not free from doubt, as is indicated by the fact that the judges of the court below were not unanimous. The immediate enforcement of the order if the judgment below were not affirmed here would have resulted in a serious and unnecessary disturbance of a course of business, affecting not alone the parties to this litigation, but the patrons of the various ware-

houses, which the court below found would be irreparable. These considerations, taken together, were sufficient to call for the exercise of its discretion. Cf. *Virginian Ry. Co.* v. *United States*, 272 U.S. 658, 672."

In *State of North Carolina* v. *U. S.*, 56 F. Supp. 606, 621, a three-judge District Court sustained the validity of an order of the Commission and denied a stay of the order pending appeal, staing that the order was "clearly valid", but upon appeal the Supreme Court held the order invalid and reversed the lower court on the merits, 325 U.S. 507.

In *Radio Corp. of America* v. *United States*, 95 F. Supp. 660, a majority of a three-judge District Court, one judge dissenting, sustained the validity of an order of the Federal Communications Commission, but issued an injunction staying enforcement of the order pending appeal to the Supreme Court. At page 669, the Court said:

"Even though we propose to allow defendants' motion for a summary judgment, it does not follow that the temporary restraining order heretofore entered should not remain in effect. In fact, we are definitely of the view that it should, until such time as the controversy is before the Supreme Court. While there may appear to be some inconsistency in pursuing this course, we think such procedure is within our discretion. In National Broadcasting Co. v. United States, D.C., 44 F. Supp. 688, a statutory court under circumstances quite similar to those here held it was without jurisdiction to review an order of the Commission, [fol. 235] and dismissed the complaint. Even so, it granted a stay until the matter could be appealed to the Supreme Court. Holding that the District Court had jurisdiction the Supreme Court reversed. 316 U.S. 447, 62 S. Ct. 1214, 86 L. Ed. 1586. In doing so, it suggested, 316 U.S. at page 449, 62 S. Ct. at page 1215, 86 L. Ed. 1586, 'the stay now in effect will be continued, on terms to be settled by the court below.' Thereupon; the case was tried by the District Court on its merits, a summary judgment allowed in favor of the defendants and the complaint again dismissed. And again the Commission's order was stayed pending

appeal to the Supreme Court, and this time the judgment of the court below was affirmed. 319 U.S. 190, 63 S. Ct. 997, 87 L. Ed. 1344. Insofar as we are able to discern from that opinion, the stay order allowed by the District Court remained in effect until the case was finally decided by the Supreme Court."

In that decision the Court pointed out that, if the order were permitted to become effective pending appeal, the resulting changes in the status of the television broadcasting industry would reach vast proportions at great expense to the public and to the great detriment of certain radio and television manufacturers and broadcasters.

The language just quoted from the decision in that case shows that administrative orders such as that of the Interstate Commerce Commission in this case have been stayed and prevented from becoming effective long enough for a case to be twice considered by a three-judge District Court and twice by the Supreme Court of the United States.

II.

Upon the facts and circumstances in this case, this Court should unhesitatingly grant this application for an injunction suspending and restraining enforcement of the Commission's order pending determination of plaintiffs' appeal to the Supreme Court.

In the light of facts and circumstances disclosed in cases cited above upon which the Federal Courts have exercised their discretion to issue orders staying and restraining enforcement of orders of the Interstate Commerce Commission and other administrative bodies pending appeals, we point to the following facts and circumstances in the instant case which we think should convince this Court that a grave mis-[fol. 236] carriage of justice will result if the Commission's order in this case is not stayed and its enforcement restrained pending plaintiffs' appeal to the Supreme Court:

1. Counsel for defendants and intervening defendants have expressly stated that they do not request opportunity to be heard in opposition to this application, and have thereby tacitly consented to the issuance of the injunction herein prayed.

2. There is no "public interest" requiring that the order become effective pending final determination by the Supreme Court of plaintiffs' appeal. The Denver and Rio Grande Western Railroad Company filed the complaint with the Commission which resulted in the order involved in this suit. It was not and is not a "public" complaint, for the record shows that there were no complaints of shippers or "public" representatives against Union Pacific routes, nor requests demanding through routes via the Rio Grande for the involved traffic, and that, to the contrary, the complaint was the result of a planned program of the Rio Grande to divert traffic from Union Pacific routes for a "bridge" haul over its lines in order "to improve the financial condition" of the Rio Grande (R. 23, 32-33). It clearly appears from the majority opinion, sustaining the Commission's order only insofar as it requires through routes and joint rates with in-transit privileges at points on the Rio Grande "not also served by the Union Pacific", and in the report of the Commission, that Union Pacific routes afford all transit privileges at joint rates to shippers located at points served by both Union Pacific and the Rio Grande, and that the only shippers indicating a desire for transit privilege under joint rates at points on the Rio Grande "not also served by the Union Pacific" routes, are one or two livestock feeders or grazers and a fruit freezing plant at Delta, and one small "bean dealer" near Grand Junction, Colorado, neither of whom made any complaint [fol. 237] but merely testified, after being agitated and persuaded by the Rio Grande to help it win its case, and there is no evidence whatever of any urgent or immediate need by those shippers or by the little monument dealer *located on the Union Pacific* at Brigham City, Utah, for the order to become effective pending appeal, particularly since the only result would be a reduction in their freight rates to the extent of the difference between the combination of local rates and the joint rates required by the order.

3. Unless the order is stayed and its enforcement restrained pending appeal to the Supreme Court, plaintiffs and all other of the 221 railroads named in the Rio Grande's complaint to the Commission will be subjected to the alternatives, (1) of penalties of 5,000.00 per day (49 U.S.

Code, Section 16(8)) by each of those carriers for each day of their failure or refusal to comply with the order, or (2) preparing, compiling, printing, publishing and filing tariffs in conformity with the order, at an expense of thousands of dollars, and disruption of their routes and the flow of traffic over them, and loss of large amounts of revenues on traffic that might be diverted from them to the Rio Grande, which is estimated at $1,177,298.00 annually, or $3,225.00 per day for the Union Pacific alone, based upon testimony of the Rio Grande's Vice President-Traffic (R. 1656). Thus, unless this Court stays and enjoins the order pending final determination of their appeal, plaintiffs will suffer inevitable and irreparable injury, loss and damage; either from the statutory penalties, or from the cost and expense of preparing and filing tariffs required by the order and loss of traffic and revenues which the Rio Grande expects to divert to its line, as plaintiffs would be without any legal remedy to recover either or any of such losses if the order is finally held to be entirely null and void.

[fol. 238] 4. There is exceptionally grave and serious doubt of the correctness of the majority opinion and of the validity of the Commission's order, as indicated:

(a) By the fact that the majority opinion holds the major portion of the order invalid, sustains the validity of the order only in part, and that part is sustained solely upon the *unprecedented* ground that Union Pacific routes are inadequate because shippers located at points on the Rio Grande not also served by the Union Pacific do not have transit privileges at joint rates equal to those available at points on Union Pacific routes;

(b) By Circuit Judge Johnsen's unusually strong and vigorous dissenting opinion, which would hold the order invalid and strike it down entirely because of the "pervading infirmities" on which it rests;

(c) By the contrariety and divergence of views expressed by individual Commissioners in the Commission's report;

(d) By the fact shown in plaintiffs' briefs to this Court that in the four decisions the Supreme Court has rendered concerning the Commission's orders which involved the prohibition in Section 15(4) of the Act against short hauling existing routes, that Court has enjoined and annulled

three such orders (*Interstate Comm. Comm.* v. *Nor. Pac. Ry.*, 216 U. S. 538; *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269; *Thompson* v. *United States*, 343 U. S. 549), and sustained the validity of only one (*Pennsylvania R. Co.* v. *U. S.*, 323 U. S. 588), and in that case the order was not [fol. 239] based upon a lack of in-transit privileges at equal joint rates at a point not on the lines of existing routes, for the Commission's report (255 I.C.C. 333) plainly shows that the shipper was located on a line of the Pennsylvania Railroad at Hagerstown, Md., and already had full transit privileges with through routes and equal joint rates, but that application of the rates was restricted so as to give the Pennsylvania its longest possible haul over a longer route than the route required by the order. The through routes required by the order in that case eliminated four extra days' time in transit, a 149-mile out-of-line haul costing 90¢ per ton, and two switching interchanges, in contrast with a completely reverse set of facts in the instant case, where the longer Rio Grande route required by the order would result in 200 additional miles of transportation over the most "onerous" operating conditions of any western railroad, two additional interchanges between carriers and at least one or two days' more time in transit, and would short haul existnig routes at least 975 miles, and would deprive some of the plaintiffs of their entire hauls;

(e) Neither the Supreme Court nor any of the District Courts have ever sustained the validity of an order requiring an additional longer route which short hauls shorter existing routes found expressly by the Commission, as in this case, to be efficiently operated, more favorably located than the proposed route, furnishing good service to shippers located on or using those routes, having surplus capacity, and "adequate to move over its own direct routes the present volume of traffic and any additional volume that [fol. 240] may be anticipated in the foreseeable future," and the Commission has in many cases definitely and positively laid down its own prevailing rule—which it completely ignored and practically reversed in the instant case—that there is no justification for requiring an additional through route which is *longer* than, and which short hauls existing routes that are capable of hauling the traffic, for

such longer routes would "encourage wasteful and uneconomic transportation", and "would not give reasonable preference to the originating carrier", *Adrian Grain Co.* v. *Ann Arbor R. Co.*, 276 I.C.C. 331, 333-334. Only last June the Supreme Court condemned such unexplained departure by the Commission from "the prevailing rule of its prior cases", saying, "the Commission has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision", *Agriculture* v. *I.C.C.*, 74 S. Ct. 826;

(f) The grave doubt of the valdiity of the part of the order sustained by the majority opinion is further indicated by the holding in the majority opinion at page 10 that——

> "It is clear from the report and the evidence that the finding of inadequacy is based upon the lack of in-transit privileges by shippers and receivers located on the Rio Grande as to the commodities embraced in the order."

and the forthright and specific admissions in oral argument to this Court by counsel for the United States (Tr. 171-177) that the dominating consideration, if not the sole basis for the order, is in-transit privileges and the greater utilization of them at points on the Rio Grande, but that "it has never been decided" and "there is no case" holding that the Commission may use its through route powers to accomplish that purpose, and that "the Commission may [fol. 241] be entirely wrong" in requiring through routes and joint rates via the Rio Grande for the purpose of enabling the monument shipper located on the Union Pacific at Brigham City, Utah, to stop-to-partly-unload westbound carloads of monuments at points on the Rio Grande. Not only is there grave and serious doubt of the Commission's power, and no decision holding that the Commission has power, to require *any* through route for the purpose of providing more transit privileges or greater utilization of them on an additional route, even if the new route would *not* short haul existing routes, but the doubt of the power exerted by the Commission and sustained by the majority opinion in this case is increased immeasurably by the fact that, notwithstanding the express, though qualified, pro-

hibition in Section 15 (4) of the Act against short hauling existing routes, the Rio Grande route required by the order would short haul Union Pacific routes a minimum of 975 miles in every instance, leaving them hauls of a few miles in many instances, and would deprive some of the plaintiffs of their entire hauls as to practically all of the traffic the Rio Grande would divert to its line;

(g) The serious doubt of the validity of the order and of the correctness of the majority opinion insofar as it sustains the order, is further indicated by the fact that the majority opinion sustains the Commission's view that it has power to require through routes and joint rates with the Rio Grande, *not* because transportation service via Union Pacific routes is inadequate, inefficient or uneconomical, or because the Rio Grande will provide more adequate, more [fol. 242] efficient or more economic service than that provided by Union Pacific routes, but because, since the required joint rates are lower than the Rio Grande's combination rates, the order "will result in more economical transportation" via the Rio Grande than the same transportation service for which shippers over the Rio Grande must now pay the higher combination rates, whereas Section 15 (4) of the Act plainly prohibits the Commission from requiring a new route that short hauls existing routes unless the existing routes are incapable of providing adequate transportation service, and unless the new route will provide *more* efficient and *more* economic transportation service than that provided by the existing routes. As the term "more economic transportation" clearly is not met by merely reducing the Rio Grande's rates so as to equalize them with rates on Union Pacific routes, the doubt of the legality of the order and of the correctness of the majority opinion is made more serious by the fact that the required joint rates via the Rio Grande will be merely *equal* to, or "the same", as the rates via Union Pacific routes, and by the impossibility, in the face of the Commission's own correct finding that the 200-miles longer Rio Grande route has "more onerous" operating conditions than any other western line, that shipments could move *more* economically or efficiently over that line than over existing shorter Union Pacific routes.

5. The refusal of the Union Pacific and other participating carriers to short haul themselves by making through routes and equal joint rates with the Rio Grande for traffic to and from points located on their lines in the northwest has been continuous for three-quarters of a century without [fol. 243] interruption except when, as shown in the Commission's report (p. 621), the Union Pacific and the Oregon Short Line and the Oregon-Washington Railroad and Navigation Company were in separate receiverships and the joint rates then established via the Rio Grande when those lines were in the hands of the receivership court were canceled in 1906 and 1912 upon termination of the receiverships, and the cancellation of the joint rates was without protest or with the approval of the Commission (*The Ogden Gateway Case*, 35 I.C.C. 131). To permit the order to become effective pending final determination of its validity by the Supreme Court will result in serious and unnecessary disturbance of the course of business and in the disruption of these century-old routes and channels of commerce, to the irreparable injury of the plaintiffs and to the serious detriment of shippers located upon or using Union Pacific routes. (See *Warehouse Co.* v. *United States*, 283 U. S. 501, 513-514.)

6. To subject plaintiffs and the numerous other carriers involved to the statutory penalty of $5,000.00 per day for failure to comply with the order or, in the alternative, to comply with the order pending appeal and suffer inescapable and irreparable loss while litigating the question whether the order is valid would, in effect, not only nullify and make "an idle ceremony" of their statutory right to judicial review of the order, *Scripps-Howard Radio* v. *Comm'n.*, *supra*, but would also result in the taking of their property without due process of law and deprive them of their constitutional rights to equal protection of the law with owners of other kinds of property, *Ex Parte Young*, 209 U. S. 123, 147-148.

7. Plaintiffs further state to the Court that, since any benefit which the Rio Grande or any shippers might realize from immediate enforcement and operation of the Commission's order pending appeal would be the direct loss in the [fol. 244] same amount by carriers participating in the

Union Pacific routes of traffic and revenues which they have enjoyed without complaint of shippers or the public for three-quarters of a century, and because of other facts recited and shown above, no bond of the plaintiffs is required or justfiied for the security of the rights of any of the parties to this suit, and that since Rule 10(4) of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954, abolishes bonds for costs on appeal in cases of this nature, no cost bond is required; however, if the Court considers that any bond of the plaintiffs is necessary or justified on this appeal or upon the injunction pending appeal, plaintiffs will give such bond in such amount as the Court may determine and order.

Wherefore, plaintiffs respectfully pray for an injunction staying and suspending the operation, enforcement and execution of the order of the Interstate Commerce Commission hereinbefore described pending final determination of plaintiffs' appeal to the Supreme Court of the United States from the final judgment and decree entered herein by this Court; and since, as shown in Appendix A hereto, said order is now scheduled to become effective February 1, 1955, upon 30 days' notice, plaintiffs further pray that the Court act upon this application and issue such injunction as early as its convenience may permit.

Respectfully submitted, Elmer B. Collins, John J. Burchell, James C. Wilson, F. O. Steadry, L. E. Torinus, Warren H. Ploeger, Roland J. Lehman, Eugene S. Davis, Attorneys for Plaintiffs, 1416 Dodge Street, Omaha 2, Nebraska.

[fol. 245] Certificate of Service (Omitted in printing)

[fol. 246] Appendix "A" to Application (Omitted. Printed side page 222 ante)

[fol. 247] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

INJUNCTION PENDING APPEAL—December 20, 1954

Plaintiffs, Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, having filed their application stating that they will appeal to the Supreme Court of the United States from the final judgment and decree entered herein by this Court on December 20, 1954, and praying for an injunction, pursuant to Rule 62(c) of Federal Rules of Civil Procedure, staying and suspending the operation, enforcement and execution, pending final determination of their appeal to the Supreme Court, of the Interstate Commerce Commission's order which is sustained in [fol. 248] part by the majority opinion and final decree of this Court;

And it appearing to this Court that unless said order is stayed and its operation suspended and enjoined pending determination of their appeal, each of the plaintiffs and numerous other railroads may be subjected to a penalty of $5,000.00 per day if they do not comply with the requirements of the order, or to irreparable injury from loss of large sums of money in compiling and publishing the required rates and from loss of traffic and revenues, if they do comply with the order;

And the Court, finding no reason for permitting the order to become effective while its validity is being litigated, and being of opinion that the *status quo* should be preserved by staying and suspending the operation and enforcement of said order pending final determination of plaintiffs' appeal to the Supreme Court, it is hereby

Ordered, adjudged and decreed that the order of the Interstate Commerce Commission dated January 12, 1953,

in its Docket No. 30297, Denver & Rio Grande Western Railroad Company v. Union Pacific Railroad Company, et al., be and it is hereby stayed and suspended and the defendants and their officers, agents and employees are enjoined and restrained from enforcing or attempting in any way to enforce said order or any part thereof pending final determination of the plaintiffs' appeal to the Su-
[fol. 249] preme Court of the United States.

Dated December 20, 1954.

Harvey M. Johnsen, Judge, United States Court of Appeals; John C. Collet, Judge, United States Court of Appeals; John W. Delehant, Judge, United States District Court.

[fols. 250-256] Clerk's Certificate of Service of Final Judgment and Decree, Order denying Motions for New Trial and Injunction Pending Appeal—(Omitted in printing)

[fol. 257] [File endorsement omitted]

In the District Court of the United States for the District of Nebraska, Omaha Division

[Title omitted]

Notice of Appeal by Denver and Rio Grande Western Railroad Co., to the Supreme Court of the United States—Filed February 3, 1955

I.

Notice is hereby given that the Denver and Rio Grande Western Railroad Company, an intervening defendant in the above-entitled cause, hereinafter called the Rio Grande, hereby appeals to the Supreme Court of the United States from the Final Judgment and Decree entered in this cause on December 20, 1954, which set aside and enjoined, in part, the order of the Interstate Commerce Commission of January 12, 1953, in Docket No. 30297, *Denver & R. G. W. R.*

Co. v. *Union Pac. R. Co., et al.*, 287 I.C.C. 611, and remanded the cause to the Commission for such further proceedings consistent therewith as the Commission may deem appropriate.

This appeal is taken pursuant to Title 28 U.S.C. § 1253.

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme [fol. 258] Court of the United States, and include in that transcript the same record as is designated by the Union Pacific Railroad Company, et al., plaintiffs in the above-entitled cause, from that part of the decision and judgment of the Court as to which said plaintiffs appeal.

III

The following questions are presented by this appeal:

1. Whether the Court erred in disregarding and overruling the findings of fact and conclusions of law of the Interstate Commerce Commission.

2. Whether the Court erred in holding in paragraph III of its Conclusions of Law that there is no substantial evidence to support the findings and order of the Commission which required the establishment of through routes and joint competitive rates between the Union Pacific Railroad Company, the Rio Grande and other railroads with respect to the commodities and the areas specified in the order, and in substituting its own findings by which the Court modified and restricted the relief granted by the Commission to shipments consigned in the first instance to points on the Rio Grande, are there subject to in-transit privileges, and are later reshipped to points beyond the Rio Grande.

3. Whether the Court erred in interpreting and in applying to the evidence of the case, the provisions of Section 3(1), 15(3) and 15(4) of the Interstate Commerce Act. (49 U.S.C. §§ 3(1), 15(3) and 15(4)).

4. Whether the Court erred in granting an injunction enjoining and in setting aside, in part, the order of the Commission already described, which requires the Union Pacific Railroad Company and the other defendants before the Commission to participate with the Rio Grande in the es-

[fol. 259] tablishment and the maintenance of through routes and joint rates on the commodities described by the Commission to and from the northwest restricted area and the designated area east of Denver, Pueblo and Trinidad, Colorado.

5. Whether the Court erred in ruling, contrary to the findings of the Interstate Commerce Commission and the evidence, that on the commodities specified by the Commission the establishment of through routes and joint rates via the Rio Grande to and from the northwest area and a designated area east of Denver, Pueblo and Trinidad, Colorado, are not needed in order to provide adequate and more economic transportation.

6. Whether the Court erred in ruling, contrary to the findings of the Interstate Commerce Commission and the evidence, that on the commodities specified by the Commission the present transportation services and facilities were inadequate and uneconomical between the northwest area and points of destination in a designated area east of Denver, Pueblo and Trinidad and in substituting its own finding that the present transportation facilities over the Union Pacific Railroad Company are adequate.

7. Whether the Court erred in overruling the findings and conclusions of the Interstate Commerce Commission that the existing rates assailed are and will be unjust and unreasonable, and duly prejudicial to shippers and receivers using or desiring to use the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes in and to the extent that such rates exceed, [fol. 260] or may exceed, the joint rates maintained on the specified commodities from and to the same points over the Union Pacific routes.

Dated this 1st day of February, 1955.

Harry L. Welch, Farm Credit Building, Omaha, Nebraska, Harold W. Kauffman, Farm Credit Bldg., Omaha, Neb., Dennis McCarthy, Walker Bank Building, Salt Lake City 1, Utah, Robert E. Quirk, 1116 Investment Building, Washington 5, D. C., Attorneys for The Denver and Rio Grande Western Railroad Company, Intervening Defendant.

[fols. 261-263] PROOF OF SERVICE (omitted in printing)

[fol. 264] CLERK'S CERTIFICATE OF SERVICE OF NOTICE OF APPEAL—(Omitted in Printing)

[fol. 265] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

NOTICE OF APPEAL BY THE UNITED STATES OF AMERICA TO THE SUPREME COURT OF THE UNITED STATES—Filed February 17, 1955

I. Notice is hereby given that the United States of America, a defendant in the above-entitled action, hereby appeals to the Supreme Court of the United States from that portion of the final judgment and decree setting aside in part the order of the Interstate Commerce Commission, entered in this action on December 20, 1954.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record before the district court.

III. The following questions are presented by this appeal:

1. Whether there was substantial evidence to support the Commission's finding that establishment of through routes and joint rates between the Union Pacific Railroad and the [fol. 266] Rio Grande Western Railroad with respect to the commodities and the areas specified in such findings was "necessary and desirable in the public interest, in order to provide adequate and more economic transportation."

2. Whether the prohibitions in Section 3(1) of the Interstate Commerce Act against any carrier giving any undue or unreasonable preference or advantage to any particular

person, locality, etc., or subjecting any person, locality, etc. to any undue or unreasonable prejudice or disadvantage, apply even though the persons or localities subjected to such preference or prejudice are located on the lines of two different carriers.

3. Whether the district court erred in holding that the through routes and joint rates prescribed by the Commission should be limited to shipments which are stopped for in-transit service on the line of the Rio Grande Western Railroad.

Daniel M. Friedman, E. Riggs McConnell, Special Assistants to the Attorney General, Attorneys for the United States, Address: Department of Justice, Washington 25, D. C.

[fols. 267-269] Proof of Service (Omitted in Printing)

[fol. 270] In the District Court of the United States for the District of Nebraska, Omaha Division

Notice of Appeal by Union Pacific Co., et al., to the Supreme Court of the United States—February 18, 1955

I

Notice is hereby given that Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; and Wabash Railroad Company, plaintiffs in the above-entitled cause, and Washington Public Service Commission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, intervening plaintiffs therein, hereby

appeal to the Supreme Court of the United States from that part of the final judgment and decree entered in this cause December 20, 1954, which orders, adjudges and decrees that the order of the Interstate Commerce Commission dated January 12, 1953, in its Docket No. 30297, *Denver & R. G. W. R. Co.* v. *Union Pac. R. Co. et al.*, 287 I.C.C. 611, "is valid and lawful in part", and that the injunction and [fol. 271] other relief prayed for in the complaint be denied, "consistent with said findings of fact, conclusions of law and the majority opinion of the Court filed herein". This appeal is taken pursuant to 28 U.S. Code, Section 1253.

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record of the proceedings before the specially constituted three-judge Court, including all of the record of proceedings before the Interstate Commerce Commission introduced in evidence before the Court and marked Exhibits Nos. 1-A to 1-I inclusive.

III

The following questions are presented by this appeal:

(1) Whether the Court erred in refusing to hold that, in this proceeding, brought by the Rio Grande for the admitted purposes of enhancing its financial position by diverting for a "bridge" haul over its line transcontinental through traffic now and for some 50 years moved over Union Pacific routes between points on those routes in the far northwest and points in the eastern and southern parts of the United States, the Commission was prohibited from issuing the order in this case by the provision of Section 15(4) of the Interstate Commerce Act that, "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs", and that this prohibition may not be evaded or circumvented by the Commission's assertion that in making the order

"no consideration has been given to financial needs" of the Rio Grande.

(2) Whether the Court erred in refusing to hold that, in view of the provisions of Section 15(4) of the Interstate Commerce Act (49 U.S.C., § 15(4)), the Commission acted [fol. 272] arbitrarily and unlawfully in issuing the order short hauling Union Pacific routes at least 975 miles, since the Commission found:

(a) That Union Pacific routes have lower rates than the Rio Grande and are shorter, faster, efficiently operated, adequate and have surplus capacity to haul any foreseeable volume of the through traffic involved;

(b) That movement of the same through traffic via the Rio Grande would require over 200 miles additional transportation, at least 24 hours more time in transit, and one or two additional interchange services; and that the Rio Grande maintains higher rates, is less favorably located and has more onerous operating conditions than the Union Pacific or any of the other Western lines.

(3) Whether the Court erred in failing to hold that the entire order is void because the Commission misconstrued, departed from and failed to observe the rule and norm of its previous decisions and the controlling statutory standards and criteria of Sections 1(4), 3(1) and (4) and 15(3) and (4), in basing its order:

(a) Upon the premise that the standards and conditions of Section 15(4)(b) [which permit establishment of a proposed route short hauling existing routes of other railroads, *only* if "the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation"] are lawfully observed and applied by the Commission's findings here:

1. of a need for "more" adequate and economic service than that afforded by Union Pacific routes, and

2. that the Rio Grande route is "necessary and desirable" to provide "adequate and more economic transportation",

without any finding by the Commission that the Rio Grande route is "needed" or that it will provide "more efficient" transportation than Union Pacific routes for the involved through traffic between the same origins and the same ultimate destinations;

(b) Upon the premise that the conditions which permit short hauling other carriers under Section 15(4)(b) can be met and satisfied by merely substituting the lower joint rates applicable over Union Pacific routes for the higher combination rates via the proposed Rio Grande route;

[fol. 273] (c) upon the premise that, under Section 15(4)(b), service over Union Pacific routes may lawfully be condemned and found "inadequate and less economical" than the Rio Grande route for through traffic because, *at points located on and served only by the Rio Grande,* "the Union Pacific routes and the joint rates that apply over them are not available, and higher rates apply";

(d) Upon the premise that the Commission may invoke its power under Section 15(3) and (4)(b) for the purpose of making additional transit privileges available by equalizing rates via the Rio Grande with rates applicable over Union Pacific routes;

(e) Upon the criteria that the marketing system for food articles of a perishable nature requires "as wide a distribution as possible", "as many routes as possible", "as much flexibility as possible" and "as many markets and outlets as possible", although Section 1 (4) and the prevailing rule of the Commission's prior decisions require carriers to establish only "reasonable" through routes;

(f) Upon the inconsistent criteria that:

1. food articles of a perishable nature must move to markets "with expedition and care" and "without unnecessary interruptions";

2. the longer Rio Grande route is necessary to permit the through transportation of such articles to be interrupted so that the articles may be held as long as 12 months at points on the Rio Grande for

"commercial operations" called transit privileges, and

3. ordinary livestock to stop for grazing or feeding, and marble and granite monuments to stop for partial unloading at points on the Rio Grande fall within the category of perishable food articles found by the Commission to require expeditious, careful and uninterrupted transportation;

(g) Upon the premise that the Commission may lawfully invoke its powers under Section 15(3) and (4) to obtain the remedy it desires for rates found violative of Sections 1 and 3, and that findings of violations of the latter sections afford a lawful basis for ordering the through routes and joint rates.

(4) Whether the Commission may require Union Pacific routes to short haul themselves by establishing through routes and joint rates with the Rio Grande for the sole purpose of permitting through traffic to be stopped at points on the Rio Grande, not served by the Union Pacific, for "commercial operations" (known as transit privileges), such as storing, processing and cattle grazing, at the same [fol. 274] rates the same shippers have when using Union Pacific routes between the same points of origin and the same ultimate destinations.

(5) Whether the Court's finding that transportation service via the *proposed* Rio Grande route is "inadequate and also inefficient and uneconomical" for through shipments requiring transit at points on the Rio Grande and re-shipment to final destinations beyond its termini, affords a lawful basis for the order short hauling Union Pacific routes under Section 15(4)(b), which permits short hauling other railroads only if "the Commission finds that the through route *proposed* to be established is needed in order to provide adequate, and more efficient or more economic, transportation."

(6) Whether the Court erred in failing to review and consider the whole record of evidence and all the issues tendered by the pleadings and arguments of the parties,

and in failing to hold that the order is entirely null and void, because:

(a) The order is based upon erroneous interpretations of law, and there is no rational basis or support for the order or any part of it, in the evidence or in the findings made by the Commission;

(b) The Commission did not make, and the evidence does not justify or support findings essential to the validity of the order, among others:

1. that the Rio Grande route is "needed", and that it will provide "more efficient" transportation service than Union Pacific routes (Section 15(4)(b)),

2. that diverting traffic and revenues from Union Pacific routes to the Rio Grande would serve such beneficial purpose as maintaining good service or improving it,

3. that the Rio Grande is efficiently operated, furnishes satisfactory service or has surplus capacity or ability to haul any additional volume of traffic,

4. that diverting the traffic to the Rio Grande's longer route will speed up its movement,

5. that the Rio Grande will generate new or additional traffic or contribute additional transportation facilities in the northwest area, or that existing routes [fol. 275] are insufficient or incapable of moving the traffic to and from that area,

6. that by including the Rio Grande route shippers to and from the northwest area will have lower rates than they have via Union Pacific routes,

7. that the overall transportation system or shippers using it would benefit by including the longer Rio Grande line in present routes for a "bridge" haul over its line,

8. that shippers have ever made complaint against service rendered by Union Pacific routes for the traffic involved, or demanded that the Rio Grande be included in present through routes;

(c) The evidence does not support or justify the Commission's findings—

1. that the combination of local rates via the Rio Grande are unjust and unreasonable,

2. that the joint rates which now apply over Union Pacific's shorter and more direct routes are reasonable for application via the longer and more onerous Rio Grande route,

3. that the combination rates via the Rio Grande are unduly prejudicial of shippers and receivers using or desiring to use the Rio Grande route or unduly preferential of shippers and receivers using the Union Pacific routes,

4. that the Union Pacific and other railroads discriminate against the Rio Grande in violation of Section 3(4) in maintaining through routes with the Bamberger Railroad at points on its line between Ogden and Salt Lake City, while refusing to make like joint rates with the Rio Grande at the same points,

5. that through routes and joint rates with the Rio Grande are "necessary and desirable" in the public interest to provide "adequate and more economic transportation",

6. that shippers in the northwest producing area (who testified that they sell their products in all markets in all the 48 states and 5 foreign countries) "are debarred from effective participation" in the marketing system, because they must pay higher rates if they ship through traffic via the Rio Grande than the joint rates available to them via Union Pacific routes for the same through traffic moving between the same origins and the same destinations;

[fol. 276] (d) The Commission arbitrarily refused to give effect to the requirement in Section 15(4) that reasonable preference be given the originating carriers;

(e) The Commission refused to consider or give effect to the National Transportation Policy and to the evidence showing that diversion to the Rio Grande of any substantial part of the traffic would result in waste-

ful transportation and economic waste and in serious detriment to Union Pacific service and its employees, to certain other railroads and their employees and would inflict serious economic injury to numerous communities and the public served by Union Pacific routes;

(f) The Commission arbitrarily commingled and misused its authority under, and the remedies for violations of the separate and independent provisions of Sections 1(4), 3(1) and (4) and Section 15(3) and (4), and its order is vague, uncertain, indefinite and conflicting in its requirements;

(g) Upon its findings that the Rio Grande had not sustained its complaint, the Commission acted arbitrarily and contrary to law in failing to dismiss the complaint and in ordering through routes and joint rates on the theory that because shippers had intervened and testified, that Rio Grande's complaint became a shipper complaint;

(h) The Commission acted arbitrarily and unlawfully in refusing to dismiss the entire proceeding on the ground that it was vitiated and nullified by the fact that shipper witnesses on whose testimony the order is based were admittedly solicited and procured by the Rio Grande for the purpose of helping it win its case.

(S.) Don Eastvold, Robert L. Simpson, C. W. Ferguson, Jas. B. Patten, Howard B. Black, Clarence S. Beck, Bert L. Overcash, F. O. Steadry, L. E. Torinus, Warren H. Ploeger, Roland J. Lehman, Eugene S. Davis, James C. Wilson, Elmer B. Collins. Attorneys for Plaintiffs and Intervening Plaintiffs, 1416 Dodge Street, Omaha 2, Nebraska.

[fols. 277-280] Proof of Service (Omitted in printing)

[fol. 281] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

MOTION TO HAVE CERTAIN ORIGINAL RECORDS IN THIS COURT TRANSMITTED TO THE CLERK OF THE SUPREME COURT OF THE UNITED STATES—Filed February 18, 1955

Plaintiffs-Appellants in the above-entitled cause petition the Court, pursuant to Rule 12, Paragraph 4, of the Rules of the Supreme Court of the United States, to authorize and instruct the Clerk of this District Court to transmit as a part of the record on appeal to be filed in the Supreme Court of the United States:

> Original Exhibits Nos. 1-A to 1-I, inclusive, being the certified transcript of the record of proceedings before the Interstate Commerce Commission introduced and received in evidence by the Court at the trial of the above-entitled case beginning November 23, 1953.

As grounds for this motion, Plaintiffs-Appellants represent to the Court that said exhibits consist of numerous documents, many of which are quite voluminous, including a number of exhibits which would be very difficult and ex-[fol. 282] pensive to copy or reproduce. Such expense and the unusual burden and work which would be imposed upon the office of the Clerk of this Court to reproduce or prepare copies of said exhibits will be obviated by the granting of this motion.

Wherefore, Plaintiffs-Appellants pray that the Court grant this motion and issue the accompanying order directing that the originals of the above-described exhibits, in lieu of copies thereof, be forwarded to the Clerk of the Supreme Court of the United States, as a part of the transcript of record on the appeal herein.

Elmer B. Collins, Attorneys for Plaintiffs-Appellants.

[fol. 283] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

ORDER DIRECTING THAT CERTAIN ORIGINAL RECORDS BE FORWARDED TO THE CLERK OF THE SUPREME COURT OF THE UNITED STATES IN LIEU OF COPIES THEREOF—February 18, 1955

In accordance with the motion of Plaintiffs-Appellants in the above cause to transmit the original in lieu of copies of the documents hereinafter described to the Clerk of the Supreme Court of the United States:

It is Hereby Ordered, That original exhibits numbered 1-A to 1-I, inclusive, received in evidence in this Court at the trial of this cause on November 23, 1953, may all be forwarded in lieu of copies thereof to the Clerk of the Supreme Court of the United States as a part of the transcript of the record on the appeal herein.

Dated this 17th day of February, 1955.

(S.) Harvey M. Johnsen, United States Circuit Judge.

[File endorsement omitted.]

[fol. 284] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

NOTICE OF APPEAL BY INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—February 18, 1955

I. Notice is hereby given that the Interstate Commerce Commission, defendant in the above-entitled action, hereby appeals to the Supreme Court of the United States from the final judgment setting aside the order of the Interstate Commerce Commission in part and remanding the case to

the Commission for further consideration. The judgment was entered on December 20, 1954.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

The same record as designated by the Union Pacific Railroad Company, et al., plaintiffs in the above suit, from that portion of the court's decision and judgment as to which said plaintiffs appeal.

III. The following questions are presented by this appeal:

[fol. 285] 1. Was the Court in error in holding in Paragraph III of the Conclusions of Law filed with its opinion that there was no substantial evidence to support the Commission's findings that through routes and joint competitive rates should be established between the Union Pacific Railroad Company and the Denver and Rio Grande Western Railroad Company with respect to the commodities and the areas specified in the order, and in substituting its own findings by which it modified and limited the relief granted by the Commission to shipments initially consigned to points on the Rio Grande, which are there incident to in-transit privileges, and later reshipped to points east of Denver?

2. Did the Court err in construing Section 15(4) of the Interstate Commerce Act (49 U.S.C. § 15(4)) and in holding that the Commission's finding that certain through routes should be established "in order to provide adequate, and more efficient or more economic, transportation," is jurisdictionally defective because the Commission did not first find that existing transportation is inadequate?

3. Did the Court err in substituting its judgment for that of the Commission in resolving the question whether the through routes between the Northwest area and the designated territory east of Denver, Pueblo and Trinidad, via the Rio Grande, are needed under Section 15(4) of the Interstate Commerce Act (49 U.S.C. § 15(4)) in order to provide adequate and more efficient or more economic transportation?

4. Did the Court err in enjoining and setting aside, in part, the Commission's order which requires the Union Pacific to establish and maintain, in connection with the Rio Grande, through routes and joint rates on the commodities named in the order and to and from the Northwest area and that designated east of Denver, Pueblo and Trinidad, Colo.?

[fol. 286] 5. Did the Court err in holding, contrary to the Commission's finding and the evidence, that as to the commodities specified in the Commission's order the establishment of through routes and joint rates via the Rio Grande are not needed in order to provide adequate and more economic transportation to and from the Northwest area and the area described in the order east of Denver, Pueblo, and Trinidad?

6. Did the Court err in holding, contrary to the findings of the Commission and the evidence, that, with respect to the commodities named in the order and the territory designated therein (between the Northwest area and points of destination east of Denver, Pueblo and Trinidad) the present transportation services and facilities via the Union Pacific route are inadequate and uneconomical, and in substituting for the finding made by the Commission its own finding that such services and facilities via the Union Pacific route are adequate?

7. Did the Court err in failing to sustain the Commission's finding that the assailed combination of local rates on the commodities and from and to the areas described in the order "are and for the future will be unjust and unreasonable, and unduly prejudicial of shippers and receivers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, in and to the extent that they exceed or may exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes"? (287 I.C.C. 611, 659-660.)

(S.) Edward M Reidy, General Counsel, (S.) Samuel R. Howell, Assistant General Counsel, Attorneys for Interstate Commerce Commission.

[fols. 287-290] Proof of Service (Omitted in Printing)

[fol. 291] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, OMAHA DIVISION

[Title omitted]

NOTICE OF APPEAL BY SECRETARY OF AGRICULTURE TO THE SUPREME COURT OF THE UNITED STATES—Filed February 18, 1955

I. Notice is hereby given that the Secretary of Agriculture of the United States, an intervenor-defendant in the above-entitled action, hereby appeals to the Supreme Court of the United States from the final judgment setting aside the order of the Interstate Commerce Commission in part and remanding the case to the Commission for further consideration. The judgment was entered on December 20, 1954. The Secretary of Agriculture intervened, as a matter of right under Rule 24(a) of the Federal Rules of Civil Procedure, in the action in the District Court. The right of the Secretary of Agriculture to intervene in the proceeding before the Commission, and in the review in the District Court, and to appeal from the judgment of the District Court is conferred by § 201 of the Agriculture Adjustment Act of 1938, as amended (52 Stat. 31, 36, 7 U. S. C. 1952 ed. § 1291), in which it is provided, *inter alia*, that the Secretary may, as a matter of right, intervene in a proceeding before the Interstate Commerce Commission relative to the regulation of the transportation of agricultural commodities and products and in "such case the Sec-
[fol. 292] retary shall have the rights of a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination" (7 U. S. C. 1952 ed. § 1291 (b)). The Secretary's participation in this case is also authorized by § 203 (j) of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088-1089, 7 U. S. C. 1952 ed. § 1622 (j)), by § 17 (9) of the Interstate Commerce Act (54 Stat. 916, 49 U. S. C. § 17 (9)), by 28 U. S. C. 1952 ed. §§ 1253 and 2323, and by § 10 of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1952 ed. § 1009).

II. The Secretary of Agriculture of the United States designates, as the record on appeal, for transmission to the Clerk of the Supreme Court of the United States the entire record in this cause in the District Court, including all the pleadings, evidence, and proceedings.

III. The following questions are presented by this appeal:

1. Did the District Court err in holding that under § 15 (4) of the Interstate Commerce Act (49 U. S. C. 1952 ed. § 15 (4)), the Commission cannot require the establishment of through routes—based upon a finding that such routes are needed in order to provide "adequate, and more efficient or more economic, transportation"—unless the Commission first finds that existing transportation is inadequate?

2. Did the Court err in substituting its judgment for that of the Commission in resolving the question whether the through routes between the northwest area and the designated territory east of Denver, Pueblo, and Trinidad, via the Rio Grande, are needed under section 15 (4) of the Interstate Commerce Act (49 U. S. C. 1952 ed. § 15 (4)) in order to provide adequate and more efficient or more economic transportation?

3. Did the Court err in holding that the undue or unreasonable prejudice or preference prohibited by § 3 (1) of the Interstate Commerce Act (49 U.S.C. 1952 ed. § 3 (1)) applies only to prejudice and preference shown [fol. 293] by one carrier or a combination of carriers between the entities named in § 3 (1) of the Act which are served by the one carrier or the combination acting as one?

4. Did the District Court err in holding that there is no substantial evidence to support the Commission's finding that establishment of through routes and joint rates between the Union Pacific Railroad and the Rio Grande Western Railroad with respect to the commodities and the areas specified in such finding was "necessary and desirable in the public interest, in order to provide adequate and more economic transportation"?

5. Did the District Court err in holding that the through routes and joint rates prescribed by the Commission should be limited to shipments which are stopped for in-transit service on the line of the Rio Grande Western Railroad?

6. Did the District Court err in the respects enumerated in the questions presented by the appeals of the United States and the Interstate Commerce Commission, which are adopted by reference?

Neil Brooks, Associate Solicitor, Carl R. Bullock, Henry A. Cockrum, Donald A. Campbell, Attorneys, U. S. Department of Agriculture, Attorneys for the Secretary of Agriculture of the United States.

Dated February 17, 1955.

[fols. 294-297] Proof of Service (Omitted in Printing)

[fol. 298] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 299] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 117, 118 & 119

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, et al.

UNION PACIFIC RAILROAD COMPANY, et al., Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., and

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND SECRETARY OF AGRICULTURE, Appellants,

vs.

THE UNION PACIFIC RAILROAD COMPANY, et al.

ORDER NOTING PROBABLE JURISDICTION—October 24, 1955

Appeals from the United States District Court for the District of Nebraska.

The statements of jurisdiction in these cases having been submited and considered by the Court, probable jurisdiction is noted. The cases are consolidated with Nos. 332, 333, and 334 and a total of 3 hours allowed for oral argument.

October 24, 1955.